Supreme Court, U.S.
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No. 08-

In The

Supreme Court of the United States

O&G INDUSTRIES, INC.,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

JEFFREY A. BLUEWEISS
BAI, POLLOCK, BLUEWEISS & MULCAHEY
One Corporate Drive
Shelton, CT 06484
(203) 925-8100

MICHAEL S. TAYLOR
Counsel of Record
KIMBERLY A. KNOX
WESLEY W. HORTON
BRENDON P. LEVESQUE
HORTON, SHIELDS & KNOX, P.C.
90 Gillett Street
Hartford, CT 06105
(860) 522-8338

Counsel for Petitioner O&G Industries, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

BY STATING THAT A PROVIDER OF RAIL PASSENGER TRANSPORTATION *MAY* ENTER INTO INDEMNIFICATION CONTRACTS, 49 U.S.C. § 28103(b), DID CONGRESS EXPRESS A CLEAR AND MANIFEST INTENT TO PRE-EMPT STATE LAWS OF GENERAL APPLICABILITY THAT PREVENT PARTIES TO CONSTRUCTION CONTRACTS FROM OBTAINING INDEMNIFICATION FOR THEIR OWN NEGLIGENCE?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the appellate proceedings in the Second Circuit Court of Appeals, whose judgment is sought to be reviewed.

O&G Industries, Inc. is the petitioner and National Railroad Passenger Corporation is the respondent. In addition to the petitioner and respondent, Hartford Fire Insurance Co., David E. Roberts, Administrator for the Estate of Gregory J. Roberts, and Peter and Laurel Quintiliani were parties to the proceedings in the United States District Court for the District of Connecticut.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the petitioner hereby states that O&G Industries, Inc. is a privately-held corporation. O&G Industries, Inc. has no parent corporation and no publicly-held corporation owns 10% or more of O&G Industries, Inc.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit of which review is sought is reported at 537 F.3d 153 (2008) and is republished in the Appendix at App. 1-33. The decision of the United States District Court for the District of Connecticut granting Amtrak's motion for judgment as a matter of law is unreported and is reproduced in the Appendix at App. 34-47. An earlier opinion of the district court, rejecting O&G's claim that the indemnification provision was barred by Connecticut state law, specifically Connecticut General Statutes § 52-572k, is unreported and is reproduced in the Appendix at App. 48-76.

JURISDICTION

The Court of Appeals for the Second Circuit entered judgment on August 8, 2008. On October 16, 2008, the Court of Appeals denied a timely petition for rehearing. App. 77-78. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Supremacy Clause of the U.S. Constitution (Article VI, clause 2). App. 79. The statutes involved are 49 U.S.C. § 28103, "Limitations on rail passenger transportation liability," reproduced

in the Appendix at App. 80-82, and Connecticut General Statutes, Title 52, Chapter 925, § 52-572k, "Hold harmless clause against public policy in certain construction contracts," reproduced in the Appendix at App. 83.

INTRODUCTION

The question presented in this case arises from a straightforward and undisputed set of facts, and a clearly defined dispute: Two judgments have entered against Amtrak for causing the death of one person and injury to another in a train accident. Amtrak claims that it has a federally protected right to indemnification for the judgments that cannot be limited by state law; O&G disagrees, arguing that state law *can* limit Amtrak's indemnification rights. Because Amtrak does business nationwide, with its trains traveling through almost every state in the union, and because 29 other states have laws that are nearly identical to the Connecticut law that has been invalidated in this case, the resolution of this dispute will have a far-reaching effect on the validity of numerous state laws across the country.

In addition, the Second Circuit applied a dramatically broad reading of the implied pre-emption doctrine that is wholly at odds with the principles set forth in a number of this Court's pre-emption decisions. Granting this petition would provide an opportunity for the Court to bring the Second Circuit's

overly expansive pre-emption analysis back into line with this Court's pre-emption doctrine and to prevent the Second Circuit's decision from being used as precedent to nullify any number of valid state laws.

STATEMENT OF THE CASE

A. Relevant Facts

1. Amtrak History

Amtrak was created by Congress in the Rail Passenger Service Act of 1970 in order to "avert the threatened extinction of passenger trains in the United States." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383 (1995). Our case picks up Amtrak's story several years later, in 1997, with Amtrak making a bailout request to Congress that was not very different from those being made by the financial and auto industries today. Amtrak had been in financial straits for several years, with inefficient business practices draining dollars and preventing it from breaking into the black. App. 95, 162, 172-76. It also was bogged down by complicated and stifling regulations, including federal mandates prohibiting Amtrak from contracting out for any of the services it needed to run its business and requiring that any Amtrak employees who were laid off due to certain service reductions receive up to *six years* pay. App. 146-47, 154-55. Without a large influx of cash and substantial regulatory reform, Amtrak might have collapsed. App. 121-22, 142-43.

Recognizing both Amtrak's importance as the country's only provider of nationwide passenger rail service and the inefficient and ineffective practices that had led it to the verge of extinction, Congress passed the Amtrak Reform and Accountability Act of 1997 (the Reform Act) to try to help. App. 84-88, 95-104, 140-45, 172-74. One of the main goals of the Reform Act was to bring Amtrak to profitability and make it "operate as much like a private business as possible." App. 140. In order to do this, Congress appropriated a total of $5.2 billion over the next several years. Congress also freed "Amtrak to adjust its route structure to meet demand and respond to competition rather than to congressional directive." App. 173. It removed the prohibition on contracting out, eliminated the six-year layoff payment and capped Amtrak's liability for passenger claims at $200 million per claim, requiring at the same time that Amtrak maintain insurance coverage of $200 million to protect both it and its passengers against such claims. App. 145-47, 168. Congress also called for the creation of a new Board of Directors and an Amtrak Reform Council composed of individuals with particularized expertise to assist Amtrak in determining how to operate more efficiently. App. 149-50, 168.

At the same time, because Amtrak expressed concern about the viability of its indemnification agreements with the freight railroads that often owned the tracks Amtrak operated on, App. 117, 130, 147-48, 152-53, 155, Congress included an indemnification provision. Specifically, the section now codified as 49

U.S.C. § 28103(b) states that "A provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims." App. 81. This provision is central to the question raised in this petition because it is solely on this provision that Amtrak now relies for its federal pre-emption claim.

2. The Underlying Incident

Seven years after the passage of the Reform Act, on the night of June 16, 2004, O&G employees David Roberts and Peter Quintiliani were doing construction work on a section of Interstate 95 in East Haven, Connecticut. O&G had a contract with the State of Connecticut to perform repairs to the highway, and because the highway ran above Amtrak's railroad tracks at that point, O&G had to obtain permission from Amtrak to enter its property in order to do the work. Amtrak granted its permission in the form of a contract between itself and O&G, captioned "Temporary Permit to Enter Property" (the "Permit"). App. 196-210. The Permit gave Amtrak exclusive control over all aspects of safety at the site, but obligated O&G to indemnify Amtrak, even for Amtrak's sole negligence.

With Amtrak's permission, Roberts and Quintiliani were working on the underside of the highway bridge that night, suspended under the bridge and over the railroad tracks in a manlift – a mobile platform similar to those used by electrical and telephone workers to repair wires on telephone poles along the

side of the road. Amtrak had supposedly stopped all train traffic, but unbeknownst to the workers and the on-site Amtrak safety personnel, an unscheduled "test train" was making its way down the tracks toward the work site. At the Amtrak dispatcher's office in Boston, one employee was aware that the workers were on the tracks, while another employee, just a few feet away in the same room, was aware that the test train was traveling toward the site, but the crucial information never jumped that short gap between them. By the time the test train engineer saw the construction site, it was too late for him to stop. The train slammed into the work site, killing Roberts and injuring Quintiliani, who managed to jump from the manlift just before the train hit.

B. The Underlying Litigation

Quintiliani and the Estate of Roberts sued Amtrak in the United States District Court for the District of Connecticut.[1] Amtrak admitted liability on the eve of trial, and the jury ultimately awarded the

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[1] The jurisdiction of the district court was invoked under 28 U.S.C. § 1332, because of diversity of citizenship; the plaintiffs being citizens of Connecticut and the defendant a corporation duly organized and existing pursuant to the laws of the District of Columbia with its principal place of business in the District of Columbia. The jurisdiction of the district court also was invoked under 28 U.S.C. § 1349, because Amtrak is a corporation created pursuant to an Act of Congress, 49 U.S.C. § 29401 and more than one-half of its capital stock is owned by the government of the United States.

plaintiffs in excess of $1 million each. Amtrak also brought a third-party claim against O&G, asserting that O&G was required, under the indemnification provision in the Permit, to indemnify Amtrak for the judgments entered against it, plus the costs of defense.

O&G argued that the indemnification portion of the Permit was invalid because it was against Connecticut public policy, as reflected in Connecticut General Statutes § 52-572k, which prohibits indemnification agreements in construction contracts when the agreement seeks to indemnify a party for its own negligence.[2] Amtrak countered that the Connecticut statute was pre-empted by 49 U.S.C. § 28103(b), the indemnification provision in the Reform Act ("A

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[2] Connecticut General Statutes § 52-572k provides: (a) Any covenant, promise, agreement or understanding entered into in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of any building, structure or appurtenances thereto including moving, demolition and excavating connected therewith, that purports to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of such promisee, such promisee's agents or employees, is against public policy and void, provided this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by a licensed insurer.

(b) The provisions of this section shall apply to covenants, promises, agreements or understandings entered into on or after the thirtieth day next succeeding October 1, 1977. App. 83.

provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims"). The district court found that § 28103(b) did not expressly pre-empt state law and that Congress had not occupied the entire field of Amtrak's indemnification agreements. The court concluded that the Connecticut statute was impliedly pre-empted, however, because "construing the statute ... as not preempting section 52-572k would violate both the plain language and spirit of the statute." App. 75. The Second Circuit affirmed, with its entire pre-emption holding consisting of two points: (1) a repetition of the district court's holding; and (2) a conclusion that the federal statute authorized Amtrak to enter into indemnification agreements for any claims filed against it and that "[t]his permissive mandate can hardly be reconciled with the prohibition of the Connecticut statute." App. 16, 18.

REASONS FOR GRANTING THE PETITION

I. THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THE PRE-EMPTION JURISPRUDENCE SET FORTH IN A NUMBER OF DECISIONS OF THIS COURT.

"This is a case about federalism." *Coleman v. Thompson,* 501 U.S. 722, 726 (1991). It is about recognition of and respect for "the constitutional role of the States as sovereign entities." *Alden v. Maine,*

527 U.S. 706, 713 (1999) ("the States entered the federal system with their sovereignty intact") (internal quotation omitted). It raises important questions concerning the way in which the Federal Government may exercise its undoubted power to displace state law in an area of traditional state control – state contract law and public policy with respect to indemnification. See *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 887 (2000) (Stevens, J., dissenting).

The Second Circuit has invalidated Connecticut law and public policy, finding it pre-empted by a federal act that nowhere mentions pre-emption. Twenty-nine other states have statutes that are nearly identical to Connecticut's, voiding indemnification agreements in certain construction contracts as against public policy if they seek to indemnify a party for its own negligence.[3] If allowed to stand, the Second Circuit's

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[3] See, ARIZ. REV. STAT. ANN. § 32-1159 (1998); ARK. CODE ANN. § 4-56-104 (West 2008); CAL. CIV. CODE § 2782 (West 1993); COLO. REV. STAT. ANN. § 13-50.5-102 (West 2005); DEL. CODE ANN. tit. 6 § 2704 (2008); FLA. STAT. ANN. § 725.06 (West 2008); GA. CODE ANN. § 13-8-2 (West 2008); 740 ILL. COMP. STAT. ANN. 35/1 (West 2009); IND. CODE ANN. § 26-2-5-1 (West 2008); 2008 KAN. SESS. LAWS page no. 1064-67; MD. CODE ANN., CTS. & JUD. PROC. § 5-401 (West 2009); MASS. GEN. LAWS ANN. ch. 149, § 29C (West 2008); MINN. STAT. ANN. § 337.02 (West 2008); MISS. CODE ANN. § 31-5-41 (West 2008); MO. ANN. STAT. § 434.100 (West 2008); MONT. CODE ANN. § 18-2-124 (2007); NEB. REV. STAT. § 25-21, 187 (2008); N.J. STAT. ANN. § 2A:40A-1 (West 2008); N.M. STAT. ANN. § 56-7-1 (West 2008); N.Y. GEN. OBLIG. LAW § 5-322.1 (McKinney 2008); N.C. GEN. STAT. ANN. § 22B-1 (West 2008); OHIO REV. CODE ANN. § 2305.31 (West 2008); OKLA. STAT. ANN.

(Continued on following page)

decision would permit Amtrak to exercise its discretion to contract in violation of the public policy of all of those states, or not, as it sees fit. Neither the language of the Act nor its legislative history expresses a congressional intent to confer such sweeping power over the states, and this Court should not lightly presume that Congress intended, simply by providing that Amtrak "may" enter into indemnification contracts, to wipe away all of those laws each time the train rolls into town.

The Second Circuit's opinion conflicts with the principles set forth in decisions of this Court in three significant ways: First, although the Court repeatedly has directed that the starting point of pre-emption analysis is the presumption that Congress *does not* intend to supplant state law, the Second Circuit never even mentions that presumption in its decision, and its discussion of the pre-emption question demonstrates that the presumption formed no part of its consideration. Second, although congressional action in a given area, without more, normally is insufficient to create pre-emption, the Second Circuit found pre-emption based on a single congressional grant of authority. Third, the touchstone of federal pre-emption, whether classified as "express," "field," or "conflict"

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tit. 15, § 221 (West 2008); R.I. GEN. LAWS ANN. § 6-34-1 (West 2008); S.C. CODE ANN. § 32-2-10 (2008); TENN. CODE ANN. § 62-6-123 (West 2009); UTAH CODE ANN. § 13-8-1 (West 2008); VA. CODE ANN. § 11-4.1 (West 2008); WASH. REV. CODE ANN. § 4.24.115 (West 2008).

pre-emption, is the intent of Congress and the concept that state law conflicts with the congressional purpose. Congress has allowed Amtrak to seek indemnification, but has expressed no intent to immunize Amtrak's indemnification agreements from the generally applicable state laws that must necessarily govern their interpretation and enforcement.

The Second Circuit's misapplication of this Court's pre-emption jurisprudence dangerously broadened the pre-emption doctrine to the point where almost any affirmative congressional statement could be given pre-emptive force. The Court should grant this petition in order to protect the sovereignty of state law and public policy. The Court should also grant the petition to clarify its pre-emption jurisprudence so that the lower courts may recognize and properly apply the principles governing the doctrine of implied pre-emption.

A. The Significance of the Presumption Against Pre-emption

Although the Second Circuit is silent on the point, nearly every one of this Court's cases discussing federal pre-emption begins with the presumption, rooted in federalism, that Congress does not intend to supplant state law, particularly in areas of traditional state control. See *Altria Group, Inc. v. Good,* 129 S.Ct. 538, 543 (2008); *Rice v. Santa Fe Elevator Corp.,* 331

U.S. 218, 230 (1947). In order to overcome this presumption, the Court has constructed a fairly substantial test. "Pre-emption of state law by federal statute or regulation is not favored in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has *unmistakably* so ordained." *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 634 (1981); *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142 (1963) (emphasis added). In cases concerning the states' traditional powers, "[w]e do not, absent *unambiguous evidence*, infer a scope of pre-emption beyond that which *clearly is mandated* by Congress' language." *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994), quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 533 (1992) (Blackmun, J., concurring) (emphasis added).

Even in the face of an express statement of congressional purpose, the intent to pre-empt state law must be "clear and manifest," and the "question of the substance and scope of Congress' displacement of state law still remains." *Altria*, 129 S.Ct. at 543. "Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption,'" *Altria,* 129 S.Ct. at 543, quoting *Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005). Or, as Justice Thomas more forcefully put it, "[t]o the extent that federal statutes are ambiguous, we *do not* read them to displace state law. Rather, we must be '*absolutely certain*' that Congress intended such

displacement before we give preemptive effect to a federal statute." *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 292 (1995) (Thomas, J., dissenting) (emphasis added), quoting *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

If Congress must speak in a "clear and manifest" fashion when it expressly pre-empts state law, so that the courts can say that Congress "unmistakably" intended to pre-empt, the implied pre-emption analogue to that test must be even more stringent. It would be incongruous, at best, to carefully scrutinize express statements of congressional authority, but to find implied pre-emption – where, by definition, there is *no* statement of Congressional intent to pre-empt – based upon some lesser standard. If "the intent of Congress" is the touchstone of the inquiry, it must be so whether the intent is express or necessarily inferred, but the level of certainty required by the courts before finding pre-emption should remain the same.

Here, the Second Circuit applied that lesser standard, finding implied pre-emption on the basis of an analytical framework that would be insufficient even if Congress had *expressly* pre-empted state statutes regulating indemnification, with no assurance that Congress intended such a result. The court did not apply any presumption against pre-emption and did not discuss the scope of Congress' intent in passing the Reform Act. Instead the Second Circuit construed the federal act on its face, to the outer limits of its definitional scope, and found no room for

any state regulation, summarily concluding that the "permissive [federal] mandate" could not be reconciled with Connecticut law (essentially treating the Reform Act as covering the field of Amtrak's indemnification agreements – in spite if its express statement that that was not the case).

B. The Pre-emptive Effect of Federal Regulation

"Ordinarily, the mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply pre-emption of state remedies." *English v. General Electric Co.*, 496 U.S. 72, 87 (1990). "Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all state law. . . . Instead, we must look for special features warranting pre-emption." *English*, 496 U.S. at 87, quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985). In other words, congressional action in a given area is, without more, normally not enough to create implied pre-emption of state law.

In numerous cases, congressional authority to do a thing has been insufficient to pre-empt state laws limiting the manner in which the thing may be done. In *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190 (1983), the Court recognized Congress' intent that only "the Federal Government should regulate the radiological safety

aspects involved in the construction and operation of a nuclear power plant." *Id.* at 205. Nevertheless, the Court concluded that a California law conditioning the construction of nuclear power plants on *state* approval of the proposed facility's nuclear waste storage and disposal policy was not pre-empted, because the law was based on economic rather than safety concerns. In so holding, the Court stated that, even in the face of a license from the Nuclear Regulatory Commission to construct a nuclear power plant:

> The NRC's imprimatur . . . indicates only that it is safe to proceed with such plants, not that it is economically wise to do so. Because the NRC order does not and could not *compel* a utility to develop a nuclear plant, compliance with both it and [the California law] are possible. Moreover, because the NRC's regulations are aimed at insuring that plants are safe, not necessarily that they are economical, [the California law] does not interfere with the objectives of the federal regulation.

Pacific Gas, 461 U.S. at 218-19 (footnote omitted) (emphasis added).

In *English,* the Court reaffirmed the congressional intent to maintain federal control over nuclear safety, but nevertheless found that a state common law claim for intentional infliction of emotional distress resulting from retaliation against a whistleblower who reported nuclear safety concerns was not pre-empted. This was so even though the Court

recognized that the tort claim "may have some effect on [radiological safety] decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers . . . [forcing employers to deal with such complaints by means that included] . . . altering radiological safety policies." *English*, 496 U.S. at 85. See also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (state law claim against nuclear production facility for punitive damages resulting from radioactive contamination not pre-empted in spite of "tension" with exclusive federal control of nuclear safety and "regulatory" effect of state damage award).

As in *Pacific Gas, English* and *Silkwood*, the most that can be said about the state law in this case is that it "may have some effect on" or create some "tension" with the federal act. But the Reform Act does not "compel" Amtrak to enter into any specific type of indemnification agreement, and the effect of the state law is limited to the narrow circumstance where Amtrak, in its capacity as a landowner and party to a construction contract – not in its capacity as a provider of rail passenger transportation – seeks indemnity for its own negligence. Nothing in the federal act or the legislative history suggests that Congress intended to forbid this limited regulation.

In *Florida Lime,* the appellants argued that a federal regulation approving certain avocados for sale pre-empted a California statute that applied a stricter standard, resulting in the rejection of some federally approved avocados. In concluding that the

state law was not pre-empted, this Court rejected the argument that "a federal license or certificate of compliance with minimum federal standards immunizes the licensed commerce from inconsistent or more demanding state regulations." *Florida Lime,* 373 U.S. at 141. The Court stated that the imposition of federal standards does not automatically pre-empt the application of higher state standards, *Id.* at 145-46, citing *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 162 (1942), and that without a "clear congressional mandate," it would not find that the creation of the federal standards was designed to displace all state regulation. *Florida Lime*, 373 U.S. at 147-48.

Here, the Second Circuit has imbued Amtrak's federal license to enter into indemnification contracts with unintended authority, by immunizing those contracts from state regulation. Although Congress created no standards regarding the content, scope or interpretation of the indemnification contracts that Amtrak may enter into, the Second Circuit rejected the application of state law defining the contours of those contracts. As in *Florida Lime*, the federal license should not be a bar – particularly in the absence of *any* federal standards – to the imposition of state standards defining the contours of Amtrak's indemnification agreements.

In *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960), the comprehensive federal system of inspection, approval and licensing of vessels used in interstate commerce, including inspection and approval of ships' boilers, did not pre-empt the application of

Detroit's smoke abatement ordinance (which required improvements to some federally approved boilers) to ships docked in its ports. In reaching its conclusion, the Court noted the numerous ways that state law limited the activities of federally licensed vessels:

> The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidence of local police power, not constituting a direct regulation of commerce. Thus, a federally licensed vessel is not, as such, exempt from local pilotage laws, *Cooley v. Board of Wardens of Port of Philadelphia*, 12 HOW. 299, 13 L.Ed. 996, or local quarantine laws, *Morgan's Louisiana and T.R. and S. S. Co. v. Louisiana Board of Health,* 118 U.S. 455, 6 S.Ct. 1114, 30 L.Ed. 237 or local safety inspections, *Kelly v. State of Washington*, 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed 3, or the local regulation of Wharves and Docks, *Packet Co. v. Catlettsburg*, 105 U.S. 559, 26 L.Ed. 1169. Indeed, this court has gone so far as to hold that a state, in the exercise of its police power, may actually seize and pronounce the forfeiture of a vessel "licensed for the coasting trade, under the laws of the United States, while engaged in that trade." *Smith v. Maryland*, 18 HOW. 71, 74, 15 L.Ed. 269. The present case obviously does not even approach such an extreme, for the Detroit ordinance requires no more than compliance with an orderly and reasonable scheme of regulation. The ordinance does not

> exclude a licensed vessel from the port of Detroit, nor does it destroy the right of free passage."

Huron, 362 U.S. at 447-48.

Like the state statute in *Huron*, the Connecticut statute here does not prevent Amtrak from entering into indemnification agreements. The statute merely subjects such agreements to a "reasonable scheme of regulation" based upon Connecticut's public policy to promote safe practices in construction projects within its borders by requiring parties to bear the burden of their own negligence.

Federal regulations authorizing the use of taxicabs in interstate and international commerce did not pre-empt more stringent County requirements in *Buck v. California,* 343 U.S. 99 (1952). A federal permit to conduct mining operations on *federal land* did not pre-empt California permit requirements in *California Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572 (1987). There, the Court emphasized the fact that the California Coastal Commission, charged with enforcing the state permit requirement, was not attempting to prohibit the mining, but *only to regulate it*, noting the Commission's description of the question presented as "merely whether the state can *regulate* uses rather than *prohibit* them." *Id.* at 586-87.

In *Commonwealth Edison Co. v. Montana,* 453 U.S. 609 (1981), the Court recognized a Congressional policy to promote the use of coal and acknowledged

that Montana's coal severance tax could have a negative effect on the use of coal. Nevertheless, the Court held that it would not "accept appellants' implicit suggestion that these general statements [favoring the use of coal] demonstrate a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal." *Id.* at 633, citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978) (national policy favoring free competition in gasoline sales did not pre-empt state law regulating retail sale of gasoline).

In *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978), the State of Washington imposed certain safety standards on oil tankers operating in Puget Sound, or required tug escorts for those tankers not meeting the standards. The Court found the state standards pre-empted, but not the tug escort rule, even though it also conflicted, to a degree, with the federal statutory scheme. "Of course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction characteristics are concerned does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do not constitute design or construction specifications." *Ray*, 435 U.S. at 168-69.

The congressional goal of uniformity in the application of regulations to the marine manufacturing industry, although "undoubtedly important," was insufficient to pre-empt state tort claims arising from an alleged boat design defect in *Sprietsma v. Mercury*

Marine, 537 U.S. 51 (2002) (federal statute's pre-emption clause was meant to "assure that manufacture for the domestic trade will not involve compliance with widely varying local requirements . . . yet this interest is not unyielding") *Id.* at 70. Finally, even though the National Bank Act broadly and thoroughly insulates national banks from control by the states, contracts made by national banks are "governed and construed by State laws." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 6 (2007), quoting *Nat'l Bank v. Commonwealth,* 76 U.S. 353, 362 (1869).

The import of these decisions and numerous others that could be cited is that, even in cases where Congress has extensively regulated in a given area, a congressional license to engage in certain conduct does not prohibit the states from regulating that conduct. (In fact, Congress generally assumes that the states *will* regulate federally authorized conduct. See Section II, below). Of course, where Congress has expressly authorized something and a state has expressly prohibited the same thing, the state law must be pre-empted. See *Barnett Bank v. Nelson,* 517 U.S. 25 (1996) (a federal act permitting national banks to sell insurance in certain circumstances pre-empted a state statute prohibiting banks from selling insurance). But that is not this case.

Congress, in its effort to make Amtrak "run more like a private business," has simply given Amtrak the authority to enter into indemnification agreements. Congress has not extensively regulated, it has said

only that Amtrak "may" contract for indemnification. Under the Connecticut statute, Amtrak may still enter into indemnification agreements, subject only to a limitation in scope, not the right to indemnification in general, such as for vicarious or contractual liability. Because Connecticut law merely defines the contours of indemnification in the construction context, and because Congress has said nothing to suggest that it intended to prevent such definitional regulation, the Second Circuit's decision conflicts with this Court's pre-emption principles.

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT CONCERNING THE PRE-EMPTIVE EFFECT, IF ANY, OF CONGRESSIONAL AUTHORITY FOR AMTRAK TO ENTER INTO INDEMNIFICATION CONTRACTS.

A. The Substance and Scope of Congressional Intent

In order to find that Congress intended to oust state law, it is not enough to say that Congress intended to pre-empt *something*. Rather, courts must find that Congress specifically intended to pre-empt state control of the matters governed by the state statute in question. Otherwise, federal pre-emption becomes a question of what Congress might have meant, rather than what it actually said, and the

presumption against pre-emption becomes a presumption in favor of it.

Even in the face of an express pre-emption clause, this Court will not find pre-emption without carefully considering the "substance and scope" of Congress' intended displacement of state law. *Altria*, 129 S.Ct. at 543. That same consideration takes on even greater significance in the absence of an express statement, where the sovereignty of the states is overcome without any overt expression by Congress of an intent to do so. The Second Circuit's failure to consider the "substance and scope" of congressional intent, a failure completely at odds with this Court's precedents, is compelling evidence that its decision represents a significant departure from this Court's pre-emption doctrine.

While the Second Circuit correctly noted that the Act, on its face, does not limit the "claims" for which Amtrak may seek indemnification, its heavy reliance on that fact to reach its ultimate conclusion on pre-emption was misplaced; an "uncritical literalism" being of no help in determining Congress' true intent. *New York State Conference of Blue Cross & Blue Shields Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). Unless Congress intended that Amtrak's indemnification agreements be completely unlimited in scope, the statement that Amtrak "may" seek indemnification sheds almost no light on Congress' intent with respect to how broad that indemnification might be. Instead, it merely begs the question whether Congress intended such a broad protection

for Amtrak's indemnification agreements that state law, which undoubtedly cannot forbid them entirely, also cannot alter their parameters.

In considering the scope of congressional intent, it is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *California Fed. Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 284 (1987) (internal quotation omitted). In *Guerra*, the Court addressed the pre-emptive effect of the Pregnancy Discrimination Act (PDA), which prohibited discrimination on the basis of pregnancy as sex discrimination under Title VII. At issue was a California employment statute giving pregnant workers greater benefits than non-pregnant workers with respect to extended absences from work.

Petitioners argued that, in prohibiting discrimination based on pregnancy, the PDA precluded both discrimination *against* pregnant workers and discrimination *in favor* of pregnant workers. Although the language of the statute simply precluded discrimination, and thus applied, on its face, to both forms of discrimination, the Court noted that "the *context* in which Congress considered the issue of pregnancy discrimination" supported the view that, regardless of this language, Congress was *unconcerned* with special accommodations for pregnancy when it passed the act. *Guerra,* 479 U.S. at 285-86 (emphasis added).

As in *Guerra*, considering the Reform Act on its face does not reveal the substance and scope of Congress' intent. The Act allows Amtrak to enter into "contracts that allocate financial responsibility for claims," but is not clear about what claims Congress was concerned with. More important, regardless of the variety of claims involved, it says nothing whatsoever about Congress' intent with regard to the scope of the indemnification that Amtrak may contract for.

In *ACF Industries, Inc.*, 510 U.S. at 332, the Court construed a federal law that prohibited certain state taxes on property owned by rail carriers as unreasonably burdensome and discriminatory with respect to interstate commerce. Among the prohibited taxes were assessments based on differing rates for rail and non-rail property and "another tax that discriminates against a rail carrier providing transportation." In spite of this language, the Court found that a state property tax that included rail property but specially exempted certain non-rail property – undoubtedly a discriminatory scheme – was not preempted, because Congress intended to preclude discriminatory taxes, not tax exemptions.

Responding to the rail owners' reliance on legislative history, including legislative statements that the bill would prohibit "the imposition of any other tax which results in the discriminatory treatment of any common or contract carrier," the Court found that the legislative history did "nothing more than manifest Congress' general concern with the discriminatory

taxation of rail carriers." The Court went on to say that the rail owners had not pointed "to a single instance in the legislative record suggesting that Congress had any particular concern with property tax exemptions, or that Congress intended to prohibit exemptions in [the bill]." *ACF Industries, Inc.*, 510 U.S. at 345.

Here, both the district court and the Second Circuit emphasized certain isolated statements from the legislative history that supported their conclusion that Congress intended to protect Amtrak's right to seek indemnification for "all claims." As in *ACF*, however, those general statements did not convey the broader Congressional intent reflected in the legislative history as a whole. Further, like the language of the Reform Act itself, those statements convey nothing about the scope of the indemnification agreements that Congress intended to protect from state interference.

Neither the narrow language of the indemnification provision in the Reform Act nor selected references from the legislative history are sufficient to demonstrate the true nature of Congress' intent to pre-empt state law. When "the question is whether a Federal act overrides a state law, the entire scheme of the statute, must, of course, be considered . . . " *Hines v. Davidowitz*, 312 U.S. 52, 67 n.20 (1941). "We must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n.*, 505 U.S. 88, 99 (1992) (internal quotation omitted).

The Second Circuit's narrow analysis, focusing exclusively on the universe of claims for which Amtrak might seek indemnification – for "all claims," in the court's judgment – led the Second Circuit to find pre-emption without any consideration of the *scope of the indemnification* that Amtrak could obtain for those claims. Sixty years ago, this Court recognized the danger of presuming that Congress intended to pre-empt state law simply because the state law and a federal act covered the same subject matter. In *California v. Zook,* 366 U.S. 725 (1949), the Court was faced with a California statute and a federal act that both required licensing for certain interstate arrangements made by travel agents. The travel agents argued that the state law was pre-empted because Congress had already legislated on the subject. The Court rejected this argument, stating that:

> Respondents' automatic 'coincidence means invalidity' theory, applied in an area as imbued with the state's interest as is this one . . . would lead us to the conclusion that a state may not make a dealer in perishable agricultural commodities respect its laws on the fraudulent nonpayment of an obligation, if that fraud occurred after an interstate shipment, 7 U.S.C. § 499b(4) . . . for Congress has not expressly saved such prosecutions. We would hold, too, that extortion or robbery from interstate commerce under 18 U.S.C. § 1951 . . . or 18 U.S.C. § 2117 is immune from state action; that the wrecking of a bridge over an interstate railroad is an 'exclusively federal' offense, 18 U.S.C. § 1992

> . . . ; that the transmittal of a ransom note in interstate commerce cannot be punished by local authorities, 18 U.S.C. § 875 . . . In short, we would be setting aside great numbers of state statutes to satisfy a congressional purpose which would only be the product of this Court's imagination.

Zook, 336 U.S. at 732-33.

The prohibited presumption in *Zook* is precisely the one the Second Circuit made here. The legislative history of the Reform Act demonstrates: (1) that the only "claims" that Congress (or Amtrak, for that matter) was concerned with were claims for passenger injuries; and (2) that the only indemnification agreements that Congress sought to protect were agreements between Amtrak, in its capacity as a passenger rail carrier, and other railroads. Protecting Amtrak in its capacity as a landowner entering into construction contracts simply was not within the scope of Congress' concern. In spite of that, the Second Circuit's narrow focus led it to find that state regulation would be inconsistent with Congress' "permissive mandate," a mandate imaginable under the literal language of the Act, but one which Congress never intended.

As a result, there is no basis to conclude that Congress has precluded state regulation simply by addressing the subject of Amtrak's indemnification agreements. This type of "uncritical literalism," if applied to other cases, would give nearly every affirmative congressional statement pre-emptive effect.

That Congress has authorized Amtrak to contract for indemnity simply cannot mean that Congress has authorized Amtrak to disregard state authority at will.[4] Here, the power conveyed is simply to contract for indemnification free from state prohibition; it is not the power to contract for *any* indemnification (if the decedent's estate had sued Amtrak for manslaughter, for example) in the face of generally applicable state laws regulating the proper scope of such agreements.

B. State Law Governs Amtrak's Indemnification Agreements

In addition, unless Congress intended to create and apply a body of federal substantive law to Amtrak's indemnification agreements (which it has not done), it must have intended that Connecticut law would apply to the validity and enforcement of those agreements. As Professor Tribe has observed, "immunity from 'interference' obviously cannot include 'a general immunity from state law.'" Tribe, *American Constitutional Law* (3d Ed. 1999), 1223, quoting *Johnson v. Maryland*, 254 U.S. 51, 56 (1920). "Given

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[4] Amtrak is not a "department, agency or instrumentality" of the federal government, see *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 544 (2002). Even when Congress grants authority to a federal agency, the agency is limited in its power to that specifically conveyed by Congress. "[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

the interstitial character of federal law, any contrary principle, at least in the matter of regulation . . . would require Congress to undertake the overwhelming burden of having to provide a comprehensive body of rules to govern *all* of the rights and obligations of all of those who act on its behalf, including 'the mode of turning at the corners of streets.'" *Id.*

Thus, where Congress legislates, or more importantly fails to legislate, we cannot assume that Congress intends to create a legislative vacuum. See *Pacific Gas,* 461 U.S. at 207-08 (where the Nuclear Regulatory Commission repealed its regulation concerning the financial qualifications of a utility company proposing to build a nuclear power plant, it was "almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the states to continue to make these judgments"). Even in cases involving *government* contracts, the Court has recognized that the "'prudent course' . . . is often 'to adopt the ready-made body of state law as the federal rule of decision until Congress strikes a different accommodation.'" *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 691-92 (2006), quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979).

When the federal statute is considered in context, there can be little doubt that, in granting Amtrak the authority to enter into indemnification contracts, Congress intended that those contracts be governed by state laws applicable to the interpretation and enforcement of contracts generally. In fact, when

discussing O&G's separate claim that Amtrak had breached the agreement (not at issue in this petition), both the district court and the Second Circuit applied Connecticut contract law to the interpretation of the contract. App. 25, 43.

The indemnification provision of the Reform Act was not "meant as a statement of substantive law binding on the States." See *Allied-Bruce Terminix Cos.*, 513 U.S. at 291 (Thomas, J., dissenting). Like the Federal Arbitration Act in *Allied-Bruce Terminix*, the Reform Act does not create federal substantive law, such that the breach of an indemnification agreement covered by the Act would give rise to a claim invoking federal subject matter jurisdiction. Rather, it is clear that Congress intended that Amtrak's indemnification agreements be covered by applicable state contract laws.

The alternative, that Congress intended to create a federal substantive law of contract to be applied to the interpretation and enforcement of Amtrak's indemnification agreements, finds no support in the language of the Act or in any statements of Congress. See *McVeigh*, 547 U.S. at 687. Thus, while Amtrak undoubtedly can seek indemnification for any "claims," if Amtrak enters into an indemnity contract in Connecticut that does not meet Connecticut's laws governing the validity of contracts generally (because it violates the statute of frauds, for example), Connecticut must have the authority to declare the agreement invalid. And if Connecticut law can render the agreement void or invalid under generally applicable laws like the statute of frauds, it must also act

to invalidate the agreement under § 52-572k, since that statute similarly applies in a general fashion to all construction contracts governed by Connecticut law.

It is one thing to enforce agreements between rail carriers in order to further their mutual interest in protecting themselves from passenger claims. It is quite another thing to allow Amtrak to require indemnification in all of its contracts, no matter how far removed from the operations of rail passenger service. Under the Second Circuit's construction of the Reform Act, Amtrak can choose to enter into a construction contract that complies with state law or one that violates state law, and it can refuse to do business with any entity, including a municipality or state, that does not wish to provide such sweeping indemnification. It is unlikely that Congress intended to give Amtrak such unilateral power, or to create a circumstance where Amtrak can hold up municipal or state construction contracts if contractors refuse to accede to Amtrak's demand for unfettered indemnification, but that is precisely the result of the Second Circuit's decision.

If allowed to stand, the Second Circuit's construction could be used as precedent for finding unintended pre-emptive authority in almost any congressional act. The Court should take the opportunity to stem the tide of needless litigation that could result from the application of that precedent to all manner of state laws by granting this petition and

clearly defining the parameters of Congress' intent to pre-empt.

III. THIS CASE PRESENTS A CLEAR DISPUTE ON THE QUESTION OF IMPLIED PRE-EMPTION AND THE COURT SHOULD GRANT THE PETITION IN ORDER TO CLARIFY THE CONFUSING AND UNCERTAIN SCOPE OF THE IMPLIED PRE-EMPTION DOCTRINE.

Pre-emption jurisprudence has been described variously as "a muddle," "chaos," "wildly confused," and an "awful mess." Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 232-33 (2000). In his dissent in *Geier*, Justice Stevens referred to Professor Nelson's commentary in stating that the presumption against pre-emption "serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes – i.e., that state law is pre-empted if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier*, 529 U.S. at 907-08 (Stevens, J., dissenting) (noting Professor Nelson's opinion that obstacle pre-emption is not supported by the text or history of the Supremacy Clause).

In addition to providing an opportunity to address the broad pre-emptive power that the Second Circuit has conferred upon Amtrak, this case also presents an excellent platform for this Court to

further clarify the difficult landscape of implied conflict pre-emption. There is no jurisdictional question in this case and the facts concerning pre-emption are undisputed. More important, there is no confusion with the concepts of express or field pre-emption. Both the district court and the Second Circuit concluded that 49 U.S.C. § 28103(b) contains no express statement of pre-emption and that Congress did not intend to cover the field (and no party has argued to the contrary). Thus, this case presents a pure question of implied conflict pre-emption and a clear dispute between an applicable state statute and a valid federal act.

Given the "muddle" of implied pre-emption jurisprudence, it is perhaps not surprising that the Second Circuit found pre-emption without even mentioning the presumption against pre-emption, even though this Court has made that presumption a cornerstone of its jurisprudence. Similarly, it is possible that the numerous cases indicating that mere congressional action in a given area is insufficient to create pre-emption got lost in the shuffle of a doctrine that sometimes looks like it has been reduced to a simple "tension equals pre-emption" formula.

The Court should take this opportunity to offer clarity and direction to lower courts struggling with this necessarily imprecise doctrine. In the past, this Court has vigorously protected state sovereignty. Even where there has been a conflict between state and federal law,

> conflicting law absent repealing or exclusivity provisions, should be pre-empted . . . only to the extent necessary to protect the achievement of the aims of the federal law, since the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding (the state scheme) completely ousted.

Decanas v. Bica, 424 U.S. 351, 357 n.5 (1976) (internal quotation omitted), citing *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973). "Our decisions establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal act. Any conflict must be 'irreconcilable. . . . The existence of a hypothetical or potential conflict is insufficient to warrant pre-emption of the state statute.'" *Gade*, 505 U.S. at 110 (Kennedy, J., dissenting), quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

In *Kelly v. State of Washington ex rel. Foss Co.*, 302 U.S. 1 (1937), concerning Washington's state inspection requirements for vessels used in interstate commerce, the Court noted that "[u]nder our constitutional system, there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected." *Id.*, at 9-10. Finding no pre-emption, the Court stated that:

> States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'

Id. at 10.

Even though ERISA pre-empts all state laws that "relate to" an employee health benefit plan, and even though a New York law imposing certain healthcare surcharges was specifically enacted to effect the choice of providers for healthcare plans, including ERISA plans, in *New York State Conference of Blue Cross & Blue Shield Plans* the Court found that the New York law was not pre-empted, because "cost uniformity" was not, in the Court's opinion, an intended object of pre-emption and thus had only an indirect economic effect on ERISA. In reaching its conclusion, the Court held that reading the term

"relates to" to the "furthest stretch of its indeterminacy," would be to "*read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.*" *New York State Conference of Blue Cross & Blue Shield Plans,* 514 U.S. at 655 (emphasis added). That is precisely what the Second Circuit has done here. It has taken Congress' general statement of permission to Amtrak and read out of the law any presumption against pre-emption, mistaking Congress' general statement for a sweeping declaration of pre-emption.

Finally, "[o]ne important factor in pre-emption analysis is the relative weight of the state and federal interests in regulating a particular matter." *Granite Rock Co.,* 480 U.S. at 604 (Powell, J., concurring in part and dissenting in part). Here, Congress expressed no interest whatsoever in protecting Amtrak's right to seek indemnification for its own negligence in the context of construction contracts. Connecticut, on the other hand, has a strong interest in furthering its public policy and promoting safe construction work by making contractors responsible for their own negligence. States possess "broad authority under their police powers" to issue regulations, including occupational health and safety regulations, to protect workers within the state. See *DeCanas,* 424 U.S. at 356.

It is unlikely that Congress, concerned with Amtrak's financial circumstance, intended to assert those financial concerns at the cost of the safety of Connecticut's construction workers. See *Geier,* 529 U.S. at 904 (Stevens, J., dissenting) (Congress did

not intend to further its purposes at all costs). The Second Circuit gave no weight to these considerations and the Court should grant this petition in order to clarify the application of its implied pre-emption jurisprudence.

CONCLUSION

Because this case presents a substantial question of state sovereignty, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

JEFFREY A. BLUEWEISS
BAI, POLLOCK, BLUEWEISS & MULCAHEY
One Corporate Drive
Shelton, CT 06484
(203) 925-8100

MICHAEL S. TAYLOR
Counsel of Record
KIMBERLY A. KNOX
WESLEY W. HORTON
BRENDON P. LEVESQUE
HORTON, SHIELDS & KNOX, P.C.
90 Gillett Street
Hartford, CT 06105
(860) 522-8338

Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 2007

(Argued: October 23, 2007 Decided: August 8, 2008)

Docket No. 06-4719-cv

O&G INDUSTRIES, INC.,

Third-Party-Defendant Appellant,

HARTFORD FIRE INSURANCE CO. AND DAVID E. ROBERTS, ADMINISTRATOR FOR THE ESTATE OF GREGORY J. ROBERTS,

Plaintiffs,

PETER QUINTILIANI AND LAUREL QUINTILIANI,

Consolidated Plaintiffs,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant-Third-Party-Plaintiff Appellee,

Before: FEINBERG, WINTER, and STRAUB, *Circuit Judges*.

Appeal from the judgment of the United States District Court for the District of Connecticut (Dorsey, J.) entered in a third-party action for indemnity, following an accident in which a train owned and operated by defendant-third-party-plaintiff appellee Amtrak caused the death of one employee of

third-party-defendant appellant O&G Industries, Inc. and injured another. In the first instance, the district court (1) granted summary judgment to Amtrak on the ground that the indemnity agreement between Amtrak and O&G was not invalid under Connecticut General Statute § 52-572k(a), because the latter is preempted by 49 U.S.C. § 28103(b), which allows rail passenger carriers to enter into indemnification agreements concerning claims brought against them; and (2) held that O&G was required, as a matter of law, to indemnify Amtrak for the liabilities and costs Amtrak incurred in the tort actions arising out of the accident, despite a jury verdict that O&G was relieved of this obligation because Amtrak's failure to adequately protect O&G workers amounted to a material breach of the contract between them. We now affirm the rulings of the district court. We also find that any error the district court committed by precluding appellant from cross-examining an employee of the appellee in the first phase of the trial (concerning the tort actions against Amtrak) and subsequently restricting appellant's direct examination of the same employee in the second phase of the trial (concerning the indemnity claim against O&G) was harmless. Finally, we dismiss for want of appellate jurisdiction O&G's challenges to the award of attorneys' fees and costs. Dismissal does not affect our jurisdiction to review the merits of the other issues on appeal. Affirmed in part and dismissed in part.

KIMBERLY A. KNOX (Michael S. Taylor and Brendon P. Levesque, on the brief), Horton Shields & Knox, P.C., Hartford, Connecticut, and Jeffrey A. Blueweiss (on the brief), Bai, Pollock, Blueweiss & Mulcahey, Shelton, Connecticut, for Third-Party-Defendant Appellant.

WILLIAM G. BALLAINE (Dawn Pinkston, of counsel, on the brief), Landman Corsi Ballaine & Ford, P.C., New York, New York, for Defendant-Third-Party-Plaintiff Appellee.

FEINBERG, Circuit Judge:

This case is procedurally complicated. The present appeal arises out of a third-party complaint brought by National Railroad Passenger Corporation (hereafter "Amtrak" or "appellee") against O&G Industries, Inc. (hereafter "O&G" or "appellant") in the United States District Court for the District of Connecticut (Dorsey, J.). In its complaint, Amtrak sought indemnification from O&G for any liabilities and costs, including attorneys' fees, that Amtrak would incur in two consolidated tort actions against it for wrongful death and personal injury damages resulting from a train accident.[1]

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[1] The two actions were *Roberts v. Nat'l R.R. Passenger Corp.*, No. 3:04-cv-1318 (D. Conn. filed Aug. 9, 2004), and *Quintiliani v. Nat'l R.R. Passenger Corp.*, No. 3:04-cv-2195 (D. Conn. filed Dec. 29, 2004). A third action was brought against Amtrak by the Hartford Fire Insurance Company, as subrogee of O&G, for damage to O&G property caused by the train accident.

(Continued on following page)

The proceedings in the district court included two rulings that O&G now appeals to this Court. First, before trial of the third-party indemnity action began, the district judge granted partial summary judgment to Amtrak on the basis of an explicit indemnity provision in a right-of-access contract between Amtrak and O&G. The court upheld the validity of the indemnity provision, ruling that 49 U.S.C. § 28103(b) (hereafter "§ 28103(b)") – which allows rail passenger carriers to enter into liability-shifting agreements – preempted Connecticut General Statute § 52-572k(a) (frequently referred to hereafter as the "Connecticut statute"). That statute prohibits, on public policy grounds, indemnity agreements entered into in connection with construction contracts, if they purport to shield the indemnitee from liability for its own negligence. O&G invoked the Connecticut statute to defeat Amtrak's indemnity claim. *See Roberts v. Nat'l R.R. Passenger Corp. v. O&G Indus.*, Nos. 3:04-cv-1318, 3:04-cv-1622 & 3:04-cv-2195, 2006 WL 648212 (D. Conn. Mar. 9, 2006).

Second, the judge granted Amtrak's post-trial motion for judgment as a matter of law, setting aside a jury verdict that O&G was relieved of its obligation to indemnify Amtrak because of Amtrak's material breach of the contract with O&G. Judge Dorsey held that Amtrak's contractual default did not affect the

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See Hartford Fire Ins. Co. v. Nat'l R.R. Passenger Corp., No. 3:04-cv-1622 (D. Conn. filed Sept. 28, 2004). This action was settled and is not part of the present appeal.

validity of the indemnity agreement, which explicitly covered accidents attributable to Amtrak's negligence. *See Roberts v. Nat'l R.R. Passenger Corp. v. O&G Indus.*, Nos. 3:04-cv-1318, 3:04-cv-1622 & 3:04-cv-2195, 2006 WL 2621733 (D. Conn. Sept. 12, 2006).

O&G argues on appeal that the district court erred in (1) granting partial summary judgment to Amtrak; (2) entering judgment for Amtrak as a matter of law; (3) curtailing O&G's cross- and direct examination of an Amtrak employee during the trial; and (4) awarding Amtrak attorneys' fees and defense costs without any evidence as to their amount and reasonableness.

On the first and second of these issues, we affirm the district court. On the third, we find the limitations of O&G's cross-examination rights by the district court, even if erroneous, were not substantially prejudicial to appellant. On the fourth issue, we conclude that we lack appellate jurisdiction over the district court's non-final award of attorneys' fees and costs.

I. BACKGROUND

The accident that led to this litigation occurred in June 2004, while Gregory Roberts and Peter Quintiliani, carpenters employed by O&G, were installing wood planks on the underside of a highway bridge suspended over Amtrak's tracks in East Haven, Connecticut. An Amtrak diesel locomotive entered their worksite without warning and collided with the

man-lift in which they were stationed. Amtrak's on-site safety personnel were unable to prevent the accident, because they were unaware of the train's scheduled passage through O&G's work area, due to poor coordination with the office of Amtrak's chief dispatcher in Boston. Furthermore, Amtrak's employees, having already de-energized the tracks at the East Haven worksite so that no electric-powered train could pass, erroneously believed that the tracks had been placed out of service. Thus, they had not made a specific request to "foul" the tracks, i.e., render them completely inoperable until O&G's crew had completed its work. At the time of the accident, therefore, none of O&G's or Amtrak's employees on duty at the site expected any train movement through the work zone.[2] The collision killed Roberts instantly; Quintiliani was injured while jumping out of the lift.

David Roberts (hereafter "Roberts"), the brother of the deceased O&G employee and administrator of his estate, filed in August 2004 a wrongful death action against Amtrak, seeking compensatory and

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[2] A more detailed description of the train accident can be found in the district court's March 2006 ruling on the parties' motions for summary judgment. *See Roberts v. Nat'l R.R. Passenger Corp. v. O&G Indus.*, Nos. 3:04-cv-1318, 3:04-cv-1622 & 3:04-cv-2195, 2006 WL 648212 (D. Conn. Mar. 9, 2006), 2006 WL 648212, at *1-3. We think it unnecessary to recount here all the factual circumstances surrounding the accident, because the crux of the dispute before us is Amtrak's indemnity claim against O&G – not responsibility for the accident, which Amtrak admitted at trial.

punitive damages. The suit by Roberts was consolidated with Quintiliani's personal injury action. After answering the two actions, Amtrak filed its third-party complaint against O&G.

The indemnity claim was based on a clause in the "Temporary Permit to Enter Upon Property" (hereafter "Permit"), a contract concluded between O&G and Amtrak in October 2003. Under the Permit, Amtrak allowed O&G access to Amtrak's property in East Haven, in order to perform construction work in relation to O&G's contract with the Connecticut State Department of Transportation regarding the rebuilding of a stretch of Interstate 95 between New Haven and Branford, Connecticut; consideration was $1. O&G, on its part, undertook to "use all necessary care and precaution to avoid accidents, delay or interference with [Amtrak's] trains or property" and abide by Amtrak's safety regulations. Pursuant to the Permit, Amtrak would provide, at its discretion and at O&G's expense, "flag service and/or other protection" necessary to maintain the "safety and continuity of railroad traffic," over which Amtrak retained exclusive control. However, the provision of "protective services" would "not relieve [O&G] from [its] complete responsibility for the adequacy and safety of [its] operations." A key feature of the Permit is the following provision:

> The Permittee [O&G] shall defend, indemnify and hold harmless Railroad [Amtrak], its officers, directors, employees, agents, servants, successors, assigns and subsidiaries,

> *irrespective of their negligence or fault,* from and against any and all losses and liabilities, . . . claims, causes of action, suits, costs and expenses incidental thereto (*including cost of defense and attorney's fees*), which any or all of them may hereafter incur, be responsible for, or pay as a result of injury, [or] death, . . . to any person . . . arising out of or . . . resulting from activities of or work performed by [O&G], its officers, employees, agents, servants, contractors, subcontractors, or any other person acting for or by permission of [O&G]. *The foregoing obligation shall not extend to situations where the negligence or fault of Amtrak, its officers, directors, [or] employees . . . is the sole causal negligence or fault, except that it shall so extend to injury [or] death . . . to employees of [O&G], its agents, servants, contractors, subcontractors, or any other person acting for or by permission of [O&G].* The foregoing obligation shall not be limited by the existence of any insurance policy or by any limitation on the amount or type of damages, compensation, or benefits payable by or for [O&G] or any contractor or subcontractor, and shall survive the termination of this permit for any reason.

(Emphasis added.) In the district court, O&G argued that the above provision was invalid under Connecticut General Statute § 52-572k(a), which declares void as against public policy agreements to indemnify a party against its own negligence, if such agreements

were made "in connection with or collateral to" construction contracts.

Before trial began on Amtrak's indemnity claim, Amtrak sought summary judgment and orders directing O&G to defend Amtrak in the two tort actions and reimburse Amtrak's reasonable attorneys' fees in defending against those claims. In March 2006, Judge Dorsey granted Amtrak partial summary judgment, concluding that § 28103(b), which allows Amtrak to enter into indemnification agreements as to claims against it, preempted the Connecticut statute and allowed Amtrak to pursue its indemnity claim at trial.

The jury trial of the consolidated actions by plaintiffs Roberts and Quintiliani against Amtrak began in March 2006. The first phase ("Phase I") was limited to the issue of damages to be awarded to plaintiffs. Amtrak conceded negligence (but not recklessness). In April 2006, the jury awarded plaintiffs $1.425 million each in compensatory damages, but rejected the punitive damages claims, finding that Amtrak's conduct was not willful or reckless.[3] At the end of the second phase of the trial ("Phase II")

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[3] The Roberts estate appealed from the judgment of the district court entered against Amtrak after the verdict. That appeal was heard by this panel the same day as the appeal now before us. In November 2007, we summarily affirmed the judgment of the district court. *See Roberts v. Nat'l R.R. Passenger Corp.*, No. 06-3036-cv, 2007 WL 3230736 (2d Cir. Nov. 1, 2007) (summary order).

concerning Amtrak's third-party complaint against O&G, the jury found that O&G was excused from its obligation to indemnify Amtrak, because Amtrak's failure to provide O&G's crew adequate on-site protection amounted to a material breach of the Permit, rendering it void in its entirety.

After this second verdict, Amtrak moved for judgment as a matter of law, under Federal Rule of Civil Procedure 50(b), arguing that there were no triable issues of fact as to the applicability of the indemnity clause in the Permit and, hence, O&G was required to indemnify Amtrak for litigation costs and damages awarded in the underlying actions by Quintiliani and Roberts. In the alternative, Amtrak sought a new trial, under Rule 59(a), on whether a material contractual default nullified the entire Permit.

In September 2006, the judge granted Amtrak's Rule 50(b) motion, concluding that Amtrak's right to indemnity explicitly accrues, under the Permit, where Amtrak is found liable for injury to or death of an O&G employee solely caused by Amtrak's own negligence or fault. *See Roberts,* 2006 WL 2621733, at *5-6. Allowing O&G to evade its indemnity obligations because of Amtrak's negligence, the court reasoned, would "render the indemnification provision meaningless." *Id.* at *6.

In December 2006, the court entered judgment in favor of Amtrak in its indemnity action against O&G. This timely appeal by O&G followed.

II. DISCUSSION

The parties to this appeal raise several issues. First, we must decide whether the Connecticut statute, which nullifies indemnity agreements insulating a contracting party from its own negligence,[4] applies, on its face, to the Permit; if it does, we must next examine whether § 28103(b), which permits Amtrak to enter into indemnification agreements,[5] preempts the Connecticut statute. Second, in considering the district court's grant of Amtrak's motion for judgment as a matter of law, we must assess whether Amtrak's conceded failure to effectively protect O&G's crew constituted a material breach of the

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[4] Connecticut General Statute § 52-572k states:

> (a) Any covenant, promise, agreement or understanding entered into in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of any building, structure or appurtenances thereto including moving, demolition and excavating connected therewith, that purports to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of such promisee, such promisee's agents or employees, is against public policy and void, provided this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by a licensed insurer.

[5] 49 U.S.C. § 28103(b) provides:

> A provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims.

Permit, discharging O&G from its indemnity obligation. Third, we review the district court's decision to preclude O&G from cross-examining an Amtrak employee during Phase I of the trial, and the judge's subsequent decision to restrict O&G's direct examination of the same employee during Phase II. Finally, we consider whether we have jurisdiction over the district court's non-quantified award to Amtrak of reasonable costs and attorneys' fees incurred in the defense of the Roberts and Quintiliani actions.

A. Preemption

Our review of a grant of summary judgment under Rule 56 is plenary. "[S]ummary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." *D'Amico v. City of New York,* 132 F.3d 145, 149 (2d Cir. 1998). We view the facts in the light most favorable to the nonmoving party and resolve all factual ambiguities in its favor. *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.,* 444 F.3d 158, 162 (2d Cir. 2006).

1) Applicability of the Connecticut Statute

In its appeal, O&G relies heavily on the Connecticut statute. In response, Amtrak claims for the first time that the Connecticut statute does not apply to the Permit because it allegedly bars indemnity

agreements only if inserted in construction contracts. Amtrak argues that the Permit was not such a contract. In the district court, however, Amtrak did not contest the applicability of the Connecticut statute, although it had ample opportunity to do so. Under the circumstances, Amtrak has waived that argument and cannot raise it on appeal. *See Greene v. United States,* 13 F.3d 577, 586 (2d Cir. 1994) (citing *Singleton v. Wulff,* 428 U.S. 106, 120 (1976)).[6] Therefore, we proceed with the preemption question on the assumption that the Connecticut statute applies, unless it is preempted.

2) Preemption by § 28103(b)

Section 28103 of Title 49 of the United States Code was enacted as part of the Amtrak Reform and Accountability Act of 1997 (hereafter the "Reform Act"). Subsection (b) of § 28103 provides that "[a] provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims." Amtrak argues that this subsection was intended to allow it to enter into enforceable indemnity agreements not voidable under state law. In

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[6] Our refusal to consider Amtrak's waived argument on the applicability of the Connecticut statute is of little importance to the final disposition of the case. As set forth below, we agree with the district court's finding that the Connecticut statute is preempted by federal law and thus does not invalidate the indemnity clause in the Permit.

Amtrak's view, § 28103(b) is at odds with and preempts the Connecticut statute.

O&G counters that § 28103(b) applies only to indemnity agreements (1) regarding claims brought by passengers and (2) concluded between passenger rail carriers like Amtrak and freight railroads. Because Gregory Roberts and Quintiliani were not Amtrak passengers, and the indemnity agreement was between Amtrak and O&G, a construction company rather than a freight railroad company, O&G maintains that § 28103(b) is not applicable and does not supersede the Connecticut statute. In support of its arguments, O&G points to subsection (a) of § 28103, which governs the issue of punitive damages to be awarded in relation to passenger claims for personal injury, wrongful death or property damage,[7] and to the legislative history of § 28103(b).

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[7] That subsection provides:

> (a) Limitations.
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> – (1) Notwithstanding any other statutory or common law or public policy, or the nature of the conduct giving rise to damages or liability, in a claim for personal injury to a passenger, death of a passenger, or damage to property of a passenger arising from or in connection with the provision of rail passenger transportation, . . . punitive damages, to the extent permitted by applicable State law, may be awarded in connection with any such claim only if the plaintiff establishes by clear and convincing evidence that the harm that is the subject of the action was the result of conduct carried out by the defendant with a conscious, flagrant indifference to the rights or safety of others.

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Federal preemption of state law is a doctrine grounded in the Supremacy Clause of the Constitution. *See* U.S. Const. Art. VI, cl. 2 ("[T]he Laws of the United States . . . made in Pursuance [of the Constitution] shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). The doctrine requires us first to ascertain congressional intent, which is "'the ultimate touchstone' of preemption analysis." *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). Intent to preempt state law may be found "(1) where Congress expressly states its intent to preempt; (2) where Congress's scheme of federal regulation is sufficiently comprehensive to give rise to a reasonable inference that it leaves no room for the state to act; and (3) where state law actually conflicts with federal law." *Marsh v. Rosenbloom*, 499 F.3d 165, 177 (2d Cir. 2007) (citing *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987)).

If, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, this paragraph shall not apply.

(2) The aggregate allowable awards to all rail passengers, against all defendants, for all claims, including claims for punitive damages, arising from a single accident or incident, shall not exceed $200,000,000.

As the district court correctly concluded, § 28103(b) does not expressly preempt state law, nor is it "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." *Roberts*, 2006 WL 648212, at *10. Preemption can thus be found here only if the Connecticut statute conflicts with § 28103(b), i.e., if compliance with both statutes is impossible, or if the Connecticut statute "'stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.'" *United States v. Locke*, 529 U.S. 89, 109 (2000) (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100-101 (1989)).

O&G first contends that no irreconcilable conflict exists between the federal and the Connecticut statutes, because Congress intended § 28103(b) to apply only to passenger claims. The argument is unavailing. The subsection contains no such limitation on its face and indeed makes plain that Amtrak may enter into contracts allocating financial responsibility (i.e., indemnity agreements) for *any* claims brought against it.

Furthermore, if Congress intended § 28103(b) to apply only to passenger claims, it would have included such qualifying language in the definition of the term "claims." Congress did not do so. The definition in subsection (e) of § 28103 is sufficiently broad to encompass any claims asserted against Amtrak –

not only those by passengers.[8] Subsection (e) defines the persons or entities *against* whom a claim may be pursued, but does not limit the class of claimants. Because the language is unambiguous on this point, we cannot "supply that which is omitted by the legislature." *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 127 (2d Cir. 2003).

The title of § 28103 – "Limitations on rail passenger transportation liability" – is of little aid to O&G's proposition that the statute covers only passenger claims. "[A] title ... cannot limit the plain meaning of unambiguous text." *Collazos v. United States*, 368 F.3d 190, 196 (2d Cir. 2004) (omission in original) (internal quotation marks omitted).

We conclude that § 28103(b), read in the context of the whole section, *see Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), authorizes Amtrak's entry into indemnification agreements for any claim filed against it,

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[8] 49 U.S.C. § 28103(e) states:

> Definition. – For purposes of this section –
>
> (1) the term "claim" means a claim made –
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> (A) against Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State; or
>
> (B) against an officer, employee, affiliate engaged in railroad operations, or agent, of Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State.

including tort claims by contractor employees. This permissive mandate can hardly be reconciled with the prohibition of the Connecticut statute.

O&G also argues that the scope of § 28103(b) only extends to indemnity agreements between Amtrak and the freight railroad companies that own most of the rail lines on which Amtrak operates and are reluctant to shoulder liabilities stemming from the use of their tracks by passenger trains. This claim is equally unpersuasive because of the unambiguous text of § 28103(b) for the reasons set forth above, and we rest our conclusion that § 28103(b) preempts the Connecticut statute on that ground.

Nonetheless, O&G's argument that congressional intent, as evidenced by the legislative history of § 28103(b), counsels a different result is meritless. Because Amtrak is a passenger rail provider mostly operating on track systems owned by freight railroads, the protection afforded by § 28103(b) will most likely apply to indemnity agreements with freight railroads. As a result, many of the congressional sponsors of the Reform Act frequently referred in their discussions to the liability allocation agreements between Amtrak and host freight railroads. That said, we find no evidence of congressional intent that § 28103(b) apply *only* in that particular set of circumstances. Rather, the goal of the Reform Act was to shield *all* of Amtrak's indemnity arrangements from legal attacks on their validity. *See Symposium: The State of the Law in the Railroad Indus.*, 26 *Transp. L.J.* 319, 336-37 (1999) ("Congress . . .

encouraged all providers of rail passenger transportation to enter into contracts that allocate financial responsibility for claims. Resolving an issue that had plagued freight railroads that host Amtrak trains, Congress also affirmed the enforceability of contracts that include indemnification obligations.").

The legislative history of § 28103(b) is illuminating. Congressional debates reveal legislative concern about Amtrak's financial problems and intention to support Amtrak's contractual arrangements designed to reduce its liability exposure. The Reform Act was meant, among other things, to ensure the enforceability of indemnity agreements Amtrak concludes with *any* other party. The Senate Committee Report is categorical in that regard:

> [T]his bill clarifies that *indemnification agreements related to the provision of rail passenger service entered into by Amtrak and other parties would be enforceable.* The Committee has been requested by Amtrak to include this provision in order to *aid Amtrak in achieving operating self-sufficiency*. . . . As long as there is the possibility that state laws governing indemnification contracts may make these contracts unenforceable, Amtrak and a freight railroad may find themselves litigating with each other. Amtrak believes that such litigation inevitably would not only adversely impact business relationships between Amtrak and the host freight railroads, but it *would also lead to*

> *significantly higher outlays in settlements and judgments to plaintiffs.*

S. Rep. No. 105-85, at 5 (1997) (emphasis added). Congress unmistakably intended "[t]he language in section 28103(b) . . . to confirm that such contractual agreements [i.e. indemnification agreements] are consistent with Federal law and public policy." 143 Cong. Rec. S11937-03 (statement of Sen. Lott). O&G's interpretation of the statute's legislative history would be inconsistent with the stated objective of § 28103(b) to solidify the enforceability of Amtrak's liability-shifting arrangements.

When the Reform Act was passed, Amtrak was in the middle of "a financial crisis, with growing and substantial debt obligations severely limiting its ability to cover operating costs and jeopardizing its long-term viability." Amtrak Reform and Accountability Act of 1997, § 2(2), Pub. L. No. 105-134, December 2, 1997, 111 Stat. 2570, at *2571; *see also* 143 Cong. Rec. S11929-03 (statement of Sen. McCain) ("Amtrak is on the verge of bankruptcy. Fundamental reforms are needed immediately if there is to be any possibility of addressing Amtrak's financial crisis and turning it into a viable operation."). The Reform Act clearly reflects Congress's distress over Amtrak's financial burdens: in 49 U.S.C. § 28103(a), Congress limited the award of punitive damages, in actions "arising from . . . the provision of rail passenger transportation," to cases where the defendant was proven to have "a conscious, flagrant indifference to the rights or safety of others." 49 U.S.C. § 28103(a)(1). In a

similar vein, Congress placed a $200 million cap on Amtrak's aggregate liability from any single accident. *Id.* § 28103(a)(2).

Against this legislative background, contentions that Congress intended to allow state law or public policy to interfere with Congress's attempt to rescue Amtrak are simply not persuasive. We believe that we must enforce and recognize the validity of the indemnity provision in the Permit. Applying the Connecticut statute would violate the plain language and spirit of § 28103(b), which therefore preempts the Connecticut statute.

B. Material Breach of the Permit

At the conclusion of Phase II of the trial, the jury found that, under the indemnity provision in the Permit, O&G was required to reimburse Amtrak for costs incurred and damages awarded in the Roberts and Quintiliani actions, but that Amtrak's material breach of the Permit relieved O&G of all its contractual duties, including the obligation to indemnify Amtrak. However, the district judge overturned the jury verdict, ruling that as a matter of law O&G's contractual obligation to indemnify Amtrak was valid regardless of Amtrak's negligence. *See Roberts,* 2006 WL 2621733, at *5-7. O&G now challenges this ruling, arguing that the jury properly found that Amtrak's violation of its duty to protect O&G's workers from passing trains resulted in termination of the entire Permit and O&G's indemnity obligation

thereunder. We review *de novo* the district court's grant of a post-verdict judgment to Amtrak as a matter of law, considering the evidence in the light most favorable to O&G, the nonmoving party. *Zellner v. Summerlin,* 494 F.3d 344, 371 (2d Cir. 2007).

"[A] material breach is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract." 23 *Williston on Contracts* § 63:3 (4th ed. 2007) (footnotes and internal quotation marks omitted). Under Connecticut law, an uncured, material failure of performance by one contracting party discharges the other party from any further performance under the contract, which is rendered unenforceable *in toto*. *See Bernstein v. Nemeyer,* 570 A.2d 164, 168 (Conn. 1990).

It is uncontroverted that O&G complied with its obligations under the Permit to perform its work on Amtrak's property so as to observe Amtrak's safety regulations and not "interfere with [Amtrak's] operations." By contrast, Amtrak's failure to provide adequate protection to O&G's workers, O&G claims, negated the Permit's purpose and amounted to a material breach. The district court rejected this claim because of the unambiguous language of the indemnity agreement, which the court held squarely applicable to the undisputed facts of the case. *See Roberts,* 2006 WL 2621733, at *6 ("The argument lacks merit, however, because the factual situation on which O&G relies for being excused from its obligation is exactly

the factual situation which gives rise to that obligation.").

We agree with the district judge's holding. Not only is the indemnity clause not qualified by or conditioned on Amtrak's obligation to operate its trains safely through the worksite, but it explicitly provides Amtrak with a right to indemnity even where "the negligence or fault of Amtrak [or] its . . . employees" is the *sole* cause of "injury, death, disease, or occupational disease to employees of" O&G.[9] O&G cannot circumvent its indemnity obligation by invoking Amtrak's negligence, which the parties envisaged and clearly determined would *not* exonerate O&G from its contractual duties. As Judge Dorsey emphasized, if O&G is allowed to evade its obligation to hold Amtrak harmless, "Amtrak's protection against ultimate responsibility for any unsafe train operation, as provided in the Permit, would be nullified." *Id.* at *6. Since the indemnity provision expressly contemplates the factual situation that arose here (i.e., Amtrak's negligence was the sole cause of injury and death to O&G's employees), Amtrak's failure to safely operate its trains through O&G's work zone could not have thwarted the Permit's essential purpose.

A reading of the Permit as a whole suggests, in fact, that at the core of the agreement was the

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[9] The indemnity provision is quoted in full in section I of the opinion, *see supra* at p. ___. Its applicability in this case has not been called into question by the parties.

parties' preoccupation with the "safety and continuity of railroad traffic," rather than the safety of O&G's personnel. The emphatic references to O&G's undertaking to take all measures necessary to avoid undue interference with train operations and its "complete responsibility for the adequacy and safety of" its activities suggest that the Permit was drafted with a principal focus on Amtrak's interests. Even Amtrak's promise to furnish protection was aimed at ensuring the safety and continuity of railroad traffic and would come into play only if, in the opinion of Amtrak's officers, "conditions warrant" it, and under the condition that O&G would bear all the costs. It is a fair inference that the essential purpose of the Permit was not to guarantee the safety of O&G's employees, but rather to authorize O&G's temporary access to Amtrak's property while reassuring Amtrak that O&G's presence on its property would neither disrupt train operations nor damage Amtrak's trains and facilities. Amtrak's negligent failure to provide adequate protection to O&G's workers did not vitiate this purpose.

O&G does not claim that every negligent act by Amtrak would constitute a material breach of the Permit. According to O&G, there could be situations involving negligent acts by Amtrak representatives that, nevertheless, would be covered by the indemnity provision without necessarily amounting to a breach of a fundamental contractual term. For example, O&G claims, "an Amtrak employee could accidentally strike someone with a tool or a piece of equipment, or

could dig a hole into which an individual might fall." *See* Br. of Appellant at 36.

The breadth of the indemnity provision refutes the distinction O&G seeks to introduce. The provision does carve out of its reach some situations where Amtrak's negligence is the sole cause of the indemnifiable loss, but O&G's obligation to indemnify Amtrak explicitly extends to instances of "injury, death, disease, or occupational disease to employees of [O&G]" exclusively caused by Amtrak's negligence or fault. If Amtrak's obligation to protect O&G's employees were a centerpiece of the Permit, and default of this obligation were intended to invalidate the Permit in its entirety, the parties could have made this clear by, for example, including a termination clause in the Permit. Absent any stipulation or indication to that effect, we cannot "unmake" the bargain the parties struck, "whether provident or improvident." *Tallmadge Bros., Inc. v. Iroquois Gas Transmission Sys., L.P.*, 746 A.2d 1277, 1292 (Conn. 2000) (internal quotation marks omitted). "Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms." *Pesino v. Atl. Bank of New York,* 709 A.2d 540, 545 (Conn. 1998) (internal quotation marks omitted). Under the circumstances of this case, a finding of material breach of the Permit would be incompatible with its plain language.

"Simply stated, . . . the evidence [here] is such that, without . . . considering the weight of the evidence, there can be but one conclusion as to the

verdict that reasonable men could have reached." *Simblest v. Maynard,* 427 F.2d 1, 4 (2d Cir. 1970). Accordingly, we affirm the district court's grant of judgment to Amtrak as a matter of law and hold that, regardless of Amtrak's negligence in causing the accident, O&G bears the valid obligation to indemnify Amtrak for the damages awarded to Quintiliani and Roberts.

C. Cross-Examination of Amtrak's Employee by O&G

The district court permitted O&G to participate in Phase I of the trial, in which plaintiffs Roberts and Quintiliani sued defendant Amtrak. The judge's rationale was that evidence presented in relation to plaintiffs' claims against Amtrak might well bear on Amtrak's indemnity claim against O&G. Nevertheless, the judge did not permit O&G's counsel to cross-examine Amtrak's New England Division Superintendent Fred Fournier. O&G's stated reason for cross-examining Fournier was to elicit testimony tending to prove that O&G was not at fault for the accident, which was entirely attributable to Amtrak's reckless conduct. O&G argues that a showing of Amtrak's recklessness would enable O&G to avoid its indemnity obligations on public policy grounds. Judge Dorsey's reasoning for denying O&G's request to cross-examine Fournier was that issues pertaining to O&G's role in the accident would be addressed in Phase II. O&G was told that it would have ample opportunity to present its recklessness defense at

that time. However, when O&G attempted to question Fournier in Phase II of the trial about whether Amtrak followed proper internal procedures to avert safety risks to O&G's on-site employees, the court sustained Amtrak's objection to this line of questioning. The judge noted that the jury had already resolved the issue of Amtrak's fault in Phase I of the trial.

O&G now claims that by precluding its cross-examination of Fournier in Phase I and limiting its questioning of the same witness in Phase II of the trial, the district judge prevented O&G from fully litigating the question of Amtrak's recklessness – on which one of O&G's defense was premised – and thus deprived it of its cross-examination rights. The error, according to O&G, warrants a new trial.

As a preliminary matter, we reject Amtrak's contention that this claim has not been preserved for appellate review. O&G repeatedly objected to the court's limitations on its examination of Fournier, articulating the concern that, if the jury found no recklessness by Amtrak in Phase I, that issue would be barred from jury consideration in Phase II.

We turn to the merits of O&G's claim. "Whether an evidentiary error implicates a substantial right depends on 'the likelihood that the error affected the outcome of the case.'" *See Tesser v. Bd. of Educ.*, 370 F.3d 314, 319 (2d Cir. 2004) (per curiam) (quoting *Malek v. Fed. Ins. Co.*, 994 F.2d 49, 55 (2d Cir. 1993)); *see also* Fed. R. Civ. P. 61 ("Unless justice requires

otherwise, no error . . . by the court . . . is ground for granting a new trial, . . . or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.")

We believe that the court's alleged error did not have a substantial impact on the outcome of the case. O&G's interests were adequately protected by Roberts and Quintiliani, the plaintiffs in Phase I. These parties were seeking punitive damages from Amtrak and thus had an equal, if not greater, incentive than O&G to show that Amtrak's conduct was reckless. The question of Amtrak's recklessness was adequately litigated by Roberts and Quintiliani and there is no indication that the jury would have found recklessness, had O&G been allowed to cross-examine Fournier. The limitation of O&G's cross-examination rights, even if erroneous, did not cause any prejudice to O&G, because "it is [not] likely that in some material respect the factfinder's judgment was swayed by the error." *Tesser,* 370 F.3d at 319 (internal quotation marks omitted). *See also United States v. Thomas,* 274 F.3d 655, 668 (2d Cir. 2001) (en banc) ("An error affects a defendant's substantial rights if it is prejudicial and it affected the outcome of the district court proceedings") (internal quotation marks omitted).

Furthermore, even supposing the district judge had not restricted O&G's examination of Fournier in Phase I, and that O&G had convinced the jury that Amtrak's conduct was reckless, it is doubtful that the outcome of the case would have been more favorable

to O&G. The indemnity provision in the Permit unequivocally requires O&G to reimburse Amtrak for *all* the losses Amtrak may sustain as a result of death or injury to O&G's employees, even when Amtrak's own negligence *or fault* is the sole cause of the incident. The unmistakable wording of the clause would thus not allow O&G to nullify its obligation to indemnify Amtrak, even if the jury had entered a punitive damages award against Amtrak on recklessness grounds.

O&G argues to us that, had it been allowed to fully participate in Phase I of the trial, and had the jury found Amtrak's conduct reckless, O&G would have been relieved of its duty to hold Amtrak harmless, by raising a public policy defense against enforcement of the indemnity agreement. We disagree. We have already held in this opinion (*see* Part II.A, *supra*) that the Connecticut statute embodying the public policy of Connecticut against indemnification for liabilities due solely to the negligence of the indemnitee[10] is preempted by § 28103(b). Subsection § 28103(b) also superseded the opinion that would have been most helpful to O&G in its public policy defense against indemnification for reckless conduct. *See Nat'l R.R Passenger Corp. v. Consol. Rail Corp. ("ConRail")*, 698 F. Supp. 951 (D.D.C. 1988) (invalidating an agreement to indemnify for losses caused by the indemnitee's gross negligence, as contrary to

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[10] *See supra* note 3.

District of Columbia public policy), *vacated on other grounds*, 892 F.2d 1066 (D.C. Cir. 1990). As Judge Dorsey correctly noted in granting summary judgment to Amtrak, it was precisely the doubts cast by the *ConRail* decision over the validity of indemnity agreements by railroad parties that prompted Congress to enact § 28103(b). *See Roberts*, 2006 WL 648212, at *11. The broad, unqualified language in § 28103(b) leaves no doubt as to the specific intent of Congress to sanction indemnity arrangements between Amtrak "and other parties" with respect to any claims against Amtrak. *See* S. Rep. No. 105-85, at 5 (1997). A finding of recklessness in Phase I, therefore, would have resulted in a higher jury verdict against Amtrak in the underlying actions against it in Phase I of the trial. This would most probably have permitted Amtrak to obtain greater recovery from O&G under the Permit; public policy considerations would not have precluded enforcement of the express direction of the indemnity provision.

In view of the above, we hold that, assuming *arguendo* that the district judge erred in preventing O&G from cross-examining Fournier in Phase I and from fully pursuing its recklessness defense in Phase II, the error was not prejudicial to O&G in the context of the trial as a whole and does not justify a new trial.

D. Attorneys' Fees

In granting Amtrak's Rule 50(b) motion for judgment as a matter of law, the district judge held that, under the indemnity agreement, Amtrak was entitled to reimbursement of its attorneys' fees, as well as the costs it incurred in Phase I of the trial, in defense of the actions brought by Roberts and Quintiliani. The judge, however, did not set the amount of attorneys' fees and litigation costs for which O&G was required to indemnify Amtrak. O&G now argues that the district court abused its discretion in awarding attorneys' fees and costs where there was no evidence as to the amount or reasonableness of these expenses. Amtrak responds that the amount of fees due would be ascertained by the district judge only after liability for such fees was determined.

Pursuant to 28 U.S.C. § 1291, we review only final decisions of the district court that "leave[] nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). A non-quantified award of attorneys' fees and costs is not appealable until the amount of the fees has been set by the district court. "We have held that where attorneys' fees are a contractually stipulated element of damages, a judgment is not final until the fees have been determined." *F.H. Krear & Co. v. Nineteen Named Trustees*, 776 F.2d 1563, 1564 (2d Cir. 1985) (per curiam); *see also Honeywell Int'l, Inc. v. Purolator Prods. Co.*, 468 F.3d 162, 164 (2d Cir. 2006). This circuit, moreover, has "rejected the doctrine of pendent appellate jurisdiction as a basis to review an

undetermined award of attorneys' fees, even when the question of liability for the fees had been consolidated with other decisions that were final." *Krumme v. WestPoint Stevens Inc.*, 143 F.3d 71, 87 (2d Cir. 1998) (citing *Cooper v. Salomon Bros.*, 1 F.3d 82, 85 (2d Cir. 1993)). We therefore dismiss for lack of appellate jurisdiction the portion of O&G's appeal challenging the district court's grant of attorneys' fees and costs incurred in Phase I of the trial.

This defect does not impair the finality of the district court's ruling on Amtrak's motion for judgment as a matter of law, nor does it divest us of jurisdiction to review the merits of the other issues on appeal. In reaching this conclusion, we apply the "bright-line rule" enunciated by the Supreme Court in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), "that a decision on the merits is a 'final decision' for purposes of [28 U.S.C.] § 1291 whether or not there remains for adjudication a request for attorney's fees." *Id.* at 202-03.[11]

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[11] Some of our pre-*Budinich* precedent might be read to support the proposition that the non-finality of an award of attorneys' fees sought as an element of contractual damages renders non-appealable the entire judgment in which such award is incorporated. *See, e.g., Union Tank Car Co. v. Isbrandtsen*, 416 F.2d 96 (2d Cir. 1969) (per curiam). However, we heed the Supreme Court's admonition in *Budinich* that "no interest pertinent to § 1291 is served by according different treatment to attorney's fees deemed part of the merits recovery," and abide by the now "uniform rule that an unresolved issue of attorney's fees . . . does not prevent judgment on the merits from

(Continued on following page)

III. CONCLUSION

We have considered all of appellant O&G's arguments and find them to be without merit. For the reasons discussed above, we affirm the district court on all issues except for the ruling on attorneys' fees, over which we lack appellate jurisdiction. AFFIRMED IN PART AND DISMISSED IN PART.

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being final." *Budinich,* 486 U.S. at 202. Application of this sensible rule also promotes the interests of judicial economy, especially in this case where resolution of the "question remaining to be decided . . . will not alter . . . or revise" the court's final rulings on the merits of the other issues on appeal. *Id.* at 199. Treating the district court's grant of Amtrak's Rule 50(b) motion as non-final and remanding the entire case to the district court would only cause further delays in the disposition of this long-pending case.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

David E. ROBERTS, Administrator for the Estate of Gregory J. Roberts, Plaintiff,	:	
v.	:	Case No. 3:04cv1318 (PCD)
NATIONAL RAILROAD PASSENGER CORPORATION, Defendant/ Third-Party Plaintiff	:	Case No. 3:04cv1622 (PCD) Case No. 3:04cv2195 (PCD)
v.	:	
O&G INDUSTRIES, INC., Third-Party Defendant.	:	

RULING ON DEFENDANT/THIRD-PARTY PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR FOR A NEW TRIAL

Defendant/Third-Party Plaintiff, National Railroad Passenger Corporation ("Amtrak"), moves, pursuant to Rules 50(b) and 59(a) of the Federal Rules of Civil Procedure, for judgment as a matter of law with respect to its claim against O&G Industries, Inc. ("O&G") for indemnity from the claims of Plaintiffs David Roberts, Administrator for the Estate of Gregory J. Roberts, and Peter Quintiliani, or for a new trial on the issue of whether Amtrak materially breached its contract with O&G, thereby relieving O&G of its obligations under the indemnity provision

of the parties' Contract. For the reasons stated herein, Defendant's Motion for Judgment as a Matter of Law [Doc. No. 286] is **granted** and Defendant's Motion for a New Trial [Doc. No. 286] is **denied**.

I. BACKGROUND

Prior to October 30, 2003, O&G, a commercial construction company, contracted with the Department of Transportation of the State of Connecticut ("DOT") to perform work related to I-95 as it passed over Amtrak's tracks in East Haven, on a bridge (Bridge 181). To permit that work, Amtrak authorized O&G's employees to enter its property by an executed temporary permit which set forth the conditions of O&G's presence on the Amtrak property. On or about October 30, 2003, Amtrak and O&G entered into a contract (the "Contract"), which permitted O&G to enter onto Amtrak property to perform demolition and construction work on Bridge 181. Under the Contract, O&G specifically agreed to the following indemnity agreement:

> 3. INDEMNIFICATION: The Permitee ["O&G"] shall defend, indemnify and hold harmless Railroad ["Amtrak"], . . . *irrespective of their negligence or fault,* from and against any and all losses and liabilities, . . . claims, causes of action, suits, costs and expenses incidental thereto (including cost of defense and attorney's fees), which any or all of them may hereafter incur, be responsible for, or pay as a result of injury, death, disease or

> occupational disease to any person and for damage . . . *arising out of or in any degree directly or indirectly caused by or resulting from activities of or work performed by Permittee,* [or] its officers, employees, agents, servants, contractors, subcontractors, or any other person acting for or by permission of the Permittee. The foregoing obligation shall not extend to situations where the negligence or fault of Amtrak, its officers, directors, employees, agents, servants, successors, assigns or subsidiaries, is the sole causal negligence or fault, *except that it shall so extend to injury, death . . . to employees of the Permittee,* its agents, servants, contractors, subcontractors or any other person acting for or by permission of the Permittee. The foregoing obligation shall not be limited by the existence of any insurance policy or by any limitation on the amount of damage, compensation or benefits payable by or for Permittee or any contractor or subcontractor, and shall survive the termination of this permit for any reason. . . .

(Contract ¶ 3, Ex. A to Woolsey Decl.) (emphasis added.) There is no question as to O&G's compliance with the conditions on its work and the responsibility of Amtrak to operate its trains with due regard to protection of the work site and O&G's workers there engaged.

On June 15, 2004, O&G employees Peter Quintiliani and Gregory Roberts were scheduled to work under Bridge 181. A scheduled train passed through

the work site at 12:30 a.m. on June 16, 2004, after which Amtrak employees grounded the catenaries over the tracks, as a result of which no electric-powered train could pass. An Amtrak employee, Annette Morman, was assigned as flag person to protect the site and the O&G employees.

There were no additional trains scheduled to pass through the site until the following morning. Ms. Morman, aware of the catenary grounding, was under the impression that the tracks were thus out of service. To ensure of the safety of the site for O&G's work, she called the office of the Chief Dispatcher for Amtrak in Boston and inquired if there were any extra trains scheduled to pass through the work site and was told by the Assistant Chief Dispatcher ("ASD") there were none, to his knowledge. He did not inquire in that regard of the dispatcher responsible for the shoreline tracks in the area of the work site, nor did he check the display board in front of him. Had he done either, he would have learned of an extra train which had proceeded from New Haven to Old Saybrook earlier on June 15 and was to return in the morning of June 16. Having no information of any trains to pass through the work site, Ms. Morman did not request foul time for the tracks, which would have shut them down for trains. Shortly after speaking to Ms. Morman, the ASD overheard the local dispatcher talking to the extra train engineer. Despite thus learning of the extra train and its westward movement, he did not advise the local dispatcher of Ms. Morman's call, nor did he inform

Ms. Morman of the extra train. Had he done either, she would have learned of the need to request foul time for the tracks at the work site and the extra train would have been headed off. Having done neither, the extra proceeded west in a normal manner to and through the work site, not being precluded by the grounded catenary since the extra was powered by a diesel, rather than an electric, locomotive. The extra engineer did not know of the O&G workers' presence at the site until he rounded a curve just to the east of the site and saw the crew's lights. Due to his proximity to the O&G work site when he saw the crew's lights, the engineer was unable to stop the train before it collided with the work lift on which the O&G employees were working.

Plaintiff Quintiliani saw the train headlight in time to free himself from a safety belt on the lift and jumped clear, suffering injuries in the process. Mr. Roberts was unable to free himself from his safety belt and he and the lift were struck by the train. Mr. Roberts died instantly. Plaintiff Quintiliani sued Amtrak for his personal injuries and Roberts' Estate sued for his death.

Amtrak filed a third-party complaint against O&G based on the indemnification agreement and hold harmless provision in the Contract. O&G moved for Summary Judgment, arguing that Amtrak's claim for contractual indemnification was barred by the provisions of section 52-572k of the Connecticut General Statutes and the articulated public policy of the State of Connecticut. Amtrak responded based on

a [sic] 49 U.S.C. § 28103, which expressly permits Amtrak to enter into indemnification agreements and which Amtrak claimed controlled, to the preclusion of the Connecticut statute. This Court ruled that 49 U.S.C. § 28103 controlled and preempted section 52-572k, such that Amtrak could invoke its claim for indemnification. It did not rule on the question whether O&G was obliged by the indemnification provision, as that issue was not raised in the pleadings. At trial, Amtrak admitted liability to Plaintiffs for compensatory damages but contested liability for punitive damages, asserting that its conduct was not reckless. The jury returned a verdict on April 6, 2006, rejecting Plaintiffs' claim that Amtrak was reckless and awarding compensatory damages to Plaintiff Roberts in the amount of $1.425 million and to Plaintiff Quintiliani in the amount of $1.425 million.

Amtrak's claim for indemnification was contested by O&G on the ground that the indemnity agreement in the Contract was not in full force and effect on the basis that Amtrak breached their agreement by failing to operate its trains in the area of the work site safely. The Court submitted this question to the jury immediately following the verdict in the main action. The jury returned a verdict on April 7, 2006, finding, in response to question (1), that the indemnity agreement obligated O&G to indemnify Amtrak, but also finding, in response to question (2), that Amtrak breached a material term of the contract, thereby relieving O&G from any obligation to indemnify Amtrak. Accordingly, judgment was entered

against Amtrak in the amount of the verdicts for the two plaintiffs.

II. STANDARD OF REVIEW

A court may grant a party's motion for judgment as a matter of law if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). The court may enter judgment as a matter of law after a jury verdict, provided a pre-verdict motion is properly renewed. Fed. R. Civ. P. 50(b). The standard for granting a post-verdict Rule 50 motion for judgment as a matter of law is the same as for granting a motion for summary judgment pursuant to Rule 56. *See Nadel v. Isaksson,* 321 F.3d 266, 272 (2d Cir. 2003). Accordingly, viewing the evidence in the light most favorable to the nonmoving party, the court must deny judgment as a matter of law unless "the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached." *Id.* (internal quotations and citations omitted) (alteration in original).

III. DISCUSSION

Amtrak now moves for judgment as a matter of law to the effect that O&G must indemnify it in the amounts of the verdicts for plaintiffs and for its costs

of defense. Amtrak contends that Roberts and Quintiliani were, without question, O&G employees working in pursuit of O&G's contract with the DOT, that the injuries and death arose out of and in relation to the work of O&G for which they were permitted to be on Amtrak's property, and that the injuries and death were solely caused by negligence or fault of Amtrak employees for which Amtrak admitted liability. Thus, Amtrak argues that the indemnification agreement in the Contract applies to the operation of its train through the work site at Bridge 181, its collision with the work lift, its causation of the injuries and death for which compensation was claimed in this action, the necessity of its defense of the Roberts and Quintiliani claims, and the judgments rendered thereon as a matter of law. Amtrak claims that notwithstanding the jury verdict, the uncontroverted facts fall squarely within the wording of the indemnification agreement and therefore, that O&G is legally obliged to indemnify and hold harmless Amtrak from the verdicts for which it is obliged and its costs of defense. Amtrak notes, in particular, the jury's finding that its conduct was not reckless, thus exonerating it from liability for punitive damages.

O&G correctly contends that there was no basis in the evidence for finding it to be responsible for the accident and injuries. Its memorandum correctly asserts Amtrak's reservation of the right to continue its train operations and its obligation to protect the work site. O&G's work was allowed to proceed with restrictions designed to permit continued safe train

operation, an obligation it clearly fulfilled. O&G argues that the jury's decision on indemnification was properly based on Amtrak's failure to safely conduct its train operations and protect O&G's workers. Amtrak did not comply with its obligation to do so. It conceded liability to Quintiliani and to the Roberts Estate. Contrary to O&G's argument, this fact does not determine whether Amtrak is entitled to indemnification.

At common law and in Permit attachment A, the incorporated "Specifications Regarding Safety and Protection of Railroad Traffic and Property" standards/procedures were set to allow Amtrak's continued train operations with a focus on safety, to avoid risk and damage to trains and passengers and to those permitted on Amtrak's property, such as O&G's employees.

The fact that Amtrak failed in its obligation to operate its trains safely, as O&G argues, is not challenged for insufficient evidentiary support for the jury's verdict. Amtrak is not precluded by the asserted failure to move at the end of the case. It noted its intent to move as required by Rule 50 of the Federal Rules of Civil Procedure, and the Court noted its awareness of the basis for the motion and reserved judgment. The lack of a detailed recitation of the grounds for the motion was due to the Court's intervention, to which O&G took no exception. Amtrak's reliance on the indemnification agreement in the Contract was apparent.

Nor was the contract right to indemnification foreclosed by the earlier rulings on Motions for Summary Judgment which were restricted to the issue of such rights being enforceable as permitted by federal law, and not foreclosed by state law which was held to be preempted. The merits of Amtrak's claim were not raised by those motions and were not decided.

What is determinative of Amtrak's claim for indemnification is the clear language of the indemnification agreement and the undisputed facts which gave rise to the injury and death claims. There is no ambiguity in the language, which states Amtrak's right to indemnification in words that are definite such that the interpretation and construction of the contract are a matter for the court. *See Tallmadge Bros., Inc. v. Iroquois Gas Transmission Sys., L.P.*, 252 Conn 479, 495 (2000) ("where there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law") (citations omitted). The indemnity language is clear and precise and leaves no basis for ambiguity, as the agreement is susceptible to but one interpretation. *United Illuminating Co. v. Wisvest-Connecticut, LLC,* 259 Conn. 665, 670-71 (2002) (holding that "a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself"). That right is stated to accrue to Amtrak, irrespective of negligence or fault on the part of its officers, directors, employees, agents and servants, from losses, liabilities, claims, causes of action and suits, which it incurs and becomes

responsible for, as a result of injury or death to any person, arising out of or in any way resulting from work performed by O&G, its employees, agents or servants. The right accrues and applies in a situation where the injury and/or death of an O&G employee is caused by the sole negligence or fault of Amtrak, its agents, servants or employees. The injury of Mr. Quintiliani and the death of Mr. Roberts, both employees of O&G who were engaged in the work of O&G, has resulted in judgments against Amtrak, as the injury and death were found to be solely caused by negligence and/or fault of Amtrak. In its simplest terms, that factual situation is squarely within the language establishing the obligation of O&G, as the permittee, to indemnify Amtrak from the judgments entered in favor of Mr. Quintiliani and the Roberts Estate.

The fact that Amtrak was obliged to operate its trains safely, and thereby to protect the O&G work site and its employees there engaged, was not creative of a condition on the right to indemnification. Amtrak's failure to do so had run its course with the injury and death and the imposition of liability therefor in the judgment against it. The right to indemnification, and to be held harmless, come into play after the accident, when the conduct on which Amtrak's liability was based had run its course. It applied to the cost of defense of the resulting claims and to the judgment entered on the basis of that liability.

O&G argues that the accident, the injuries and death, the lawsuit and the judgment were the result

of Amtrak's failure to operate its trains safely, an obligation owed to O&G, which failure materially breached the agreement between Amtrak and O&G and thus foreclosed Amtrak's enforcement of the indemnification provision. O&G thus invokes Amtrak's obligation as a condition precedent to O&G's obligation to indemnify. The argument invokes a factual situation that would vitiate O&G's agreement to indemnify. The argument lacks merit, however, because the factual situation on which O&G relies for being excused from its obligation is exactly the factual situation which gives rise to that obligation. The indemnification provision accrues and applies to situations which cause Amtrak to be held liable, i.e., conduct for which it is responsible causing injury and death to employees of O&G. That conduct is not subject to question as a matter of factual substantiation; the facts are not in dispute. The obligation of O&G to indemnify, as invoked here by Amtrak, is a simple application of an unambiguous articulation of the obligation to the undisputed facts. Amtrak failed to operate trains safely and caused injury to and death of O&G employees, a factual scenario squarely within and described by the Permit provision in which O&G agreed to indemnify and hold harmless Amtrak. To sustain O&G's argument would render the indemnification provision meaningless. The right vested in Amtrak presupposes negligence or fault on its part. O&G's argument that such negligence or fault constituted a material breach of Amtrak's duty to O&G and its employees disregards the indemnification language, which extends to Amtrak protection

from being ultimately liable for any such negligence or fault. If Amtrak's breach of its duty to operate its trains safely allows O&G to avoid indemnification, Amtrak's protection against ultimate responsibility for any unsafe train operation, as provided in the permit, would be nullified.

The effect of O&G's argument is that although O&G agreed that it would indemnify Amtrak if Amtrak was negligent or at fault so as to become liable to an O&G employee for injury or death, it should be excused from any obligation to indemnify Amtrak for Amtrak's negligence or fault. If this were true, the facts that would create a duty to indemnify would also extinguish any duty to indemnify. Indemnification, as contemplated by the parties' Contract, was owed "irrespective of [Amtrak's] negligence or fault." O&G's argument would turn this provision on its head and excuse O&G from any obligation to indemnify in a case of Amtrak negligence or fault.

The function of the Court is to enforce the clear undertaking of parties to an agreement. In this case, the language creative of O&G's agreement to indemnify is unambiguous. The facts are not in dispute as to the conduct for which Amtrak is responsible and which caused the accident, the injury, the death, and the damages found by the jury to be owed to Plaintiff Quintiliani and the Roberts Estate. The indemnification provision squarely embraces those facts and thus obliges O&G, as a matter of law, to indemnify Amtrak for the injury and death damages awarded and the costs of defense of the claims therefor.

IV. CONCLUSION

For the reasons stated herein, Amtrak's Motion for Judgment as a Matter of Law [Doc. No. 286] is **granted**. Judgment shall enter for Amtrak to recover from O&G the amount of damages it shall be obliged to pay Plaintiffs, and for its cost of defense of those claims.

SO ORDERED.

Dated at New Haven, Connecticut, September 11, 2006.

/s/
Peter C. Dorsey,
U.S. District Judge
District of Connecticut

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

David E. ROBERTS, Administrator for the Estate of Gregory J. Roberts, Plaintiff,	:	
v.	:	Case No. 3:04cv1318 (PCD)
NATIONAL RAILROAD PASSENGER CORPORATION, Defendant/ Third-Party Plaintiff	:	Case No. 3:04cv1622 (PCD) Case No. 3:04cv2195 (PCD)
v.	:	
O&G INDUSTRIES, INC., Third-Party Defendant.	:	

RULING ON MOTIONS FOR SUMMARY JUDGMENT

Defendant/Third Party Plaintiff National Railroad Passenger Corporation ("Amtrak") moves [Doc. Nos. 89, 99] pursuant to Rule 56(c) of the Federal Rules of Civil Procedure for an order (1) granting it summary judgment on its claim for contractual indemnification in the first cause of action of its third-party complaint against Third-Party Defendant O&G Industries ("O&G") in Case Nos. 04cv1318 and 04cv2195; (2) directing O&G to defend Amtrak in the actions; and (3) directing O&G to pay the amount of past costs, expenses, and reasonable attorneys' fees due to Amtrak in connecting [sic] with these actions. O&G,

in addition to opposing Amtrak's motion, moves [Doc. No. 149] separately for the entry of summary judgment in its favor in each of the three consolidated actions, Case Nos. 04cv1318, 04cv1622, and 04cv2195.

Amtrak also moves for summary judgment and seeks an order dismissing Plaintiffs' claims for punitive damages in Case Nos. 04cv1318, 04cv1622, and 04cv2195. Plaintiffs, Peter Quintiliani and David E. Roberts, administrator for the estate of Gregory J. Roberts, have filed a memorandum opposing Amtrak's motion.

For the reasons that follow, Amtrak's motion is **granted in part and denied in part**, and O&G's motion is **denied**.

I. Background

On June 16, 2004, Gregory Roberts and Peter Quintiliani were employed by O&G and were working as carpenters installing false decking on Amtrak's right of way in East Haven, Connecticut. Plaintiffs were contained in a piece of industrial equipment that extended over two Amtrak railroad tracks and were struck by an Amtrak diesel test train ("the test train"). Gregory Roberts died as a result of his injuries, and Peter Quintiliani suffered severe injuries but survived. For the sake of clarity when addressing the claims raised in the motions for summary judgment, the Court will outline more specific pre- and post-event facts.

On June 15-16, 2004, the test train was utilized to test Amtrak's Advanced Civil Speed Enforcement System ("ACSES") between New Haven and Old Saybrook. At 3:15 a.m., the Test Train departed from Old Saybrook and traveled westbound towards New Haven.

On June 15, 2004, the day preceding the accident, an Amtrak crew dispatcher called Amtrak Conductor Annette Morman to work as a flagperson for work to be performed by O&G personnel in the vicinity of the Bridge on the evening of June 15 to June 16, 2004. Morman had worked at Amtrak since May 22, 1997, first as an Assistant Conductor, and then as a Conductor since January 1, 1998, and was qualified to provide track protection for contractors.

On June 15, 2004, Morman reported for duty at approximately 10:00 p.m. and spoke with Fred Scarfi, a fully qualified Amtrak ET lineman. Morman testified that Scarfi told her that he was "taking both tracks out," which she believed "meant taking the tracks out of service, which means there would have been no train through [the] work zone." Morman also testified that she believed that tracks 1 and 2 were out of service because of her understanding of NORAC Rule 132 and her observation of ET Lineman Scarfi and Gholson placing grounds on the catenary system. Scarfi told Morman that he and another ET Lineman, Lee Gholson, would de-energize the overhead catenary system for track number 1 and that, following the scheduled passage of Amtrak's

passenger train 67, he and Gholson would also de-energize the catenary for track number 2.

Track number 1 was de-energized at 10:09 p.m. and Scarfi and Gholson were issued a clearance. Scarfi and Gholson then placed non-fouling[1] grounding apparatus on the catenary for track number 1. At approximately 11:30 p.m. on June 15, 2004, O&G's work crew, which included Plaintiff Roberts, reported to work in the vicinity of the bridge. Some of the work the O&G crew intended to try to perform involved moving false decking within bays on the underside of the bridge. At that time, Scarfi held a job briefing for all of O&G's personnel concerning the de-energization of the overhead catenary system ("OCS") for track number 1. Morman did not participate in this briefing,[2] but held a separate track safety briefing for O&G employees. Scarfi and Gholson did not participate in Morman's briefing.

All of the O&G employees present at the bridge on June 15 and June 16 had attended Amtrak's

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[1] The Amtrak Roadway Worker Protection Manual ("RWP") generally defines "fouling a track" as "the placement of an individual or an item if [sic] equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on track equipment, in any event, the placement of an individual or equipment within four feet of the field side of the near running rail."

[2] Rule 316 of Amtrak's RWP provides that "prior to performing any task, which requires fouling a track or has the potential to foul a track, all roadway workers must participate in an RWP job briefing."

contractor safety training course prior to the Accident. The Contractor Safety Course Handout identified the flagman as the authorized Amtrak employee who was qualified to protect contractor employees against the movement of trains and to obtain the use of the tracks. Following Morman's on-track safety briefing, O&G personnel went to work overhead on the bridge, and the work that they initially completed did not involve any fouling of the Amtrak tracks below them. At approximately 12:12 a.m., on June 16, 2004, Amtrak passenger train 67 passed under the Bridge on track number 2. Shortly thereafter, at 12:26 a.m., on June 16, the Amtrak Boston Power Director de-energized the overhead catenary system above track number 2 and issued a clearance to ET Lineman Scarfi.

Scarfi and Gholson then placed non-fouling grounding apparatus on the catenary for that track and held a second ET job briefing with O&G employees at approximately 12:45 a.m., and advised them that the catenary for track numbers 1 and 2 were de-energized and grounded. As with the earlier ET briefing, Morman did not participate in this second ET briefing held by Scarfi and O&G personnel. At approximately 12:39 a.m., Morman placed a phone call to Assistant Chief Dispatcher Robert McCall in Boston, asking if he knew of any extra trains that night. McCall advised Morman that there was a rail train near Old Saybrook and a work train that may have been cancelled and further advised that, as far as he knew, there were no extra ACELA passenger

trains or extra moves that night. Morman did not request foul time during her conversation with McCall. Dispatcher Steven Pratt was also working at the CETC Center, functioning as Amtrak's Shoreline dispatcher between the hours of midnight and 4:00 a.m. on June 16, 2004. Pratt was authorized to issue foul time for track numbers 1 and 2 near the Bridge. Morman, however, did not contact Pratt prior to the accident.

McCall first learned of the presence of the Amtrak Test Train on track in the Old Saybrook vicinity after his conversation with Morman. At that time, the train was approximately thirty miles from the bridge. McCall allegedly did not contact Morman to inform her of the test train allegedly because she had not requested foul time.

At approximately 3:15 a.m., Plaintiffs Roberts and Quintiliani boarded an O&G manlift and positioned it so that the boom of the lift extended through the columns of the Bridge, extended the boom towards track number 2 and began to reposition false decking in the bays of the bridge. Morman testified that she first became aware that the test train was traveling in the direction of the Bridge when she heard a hot box detection transmission over the portable radio. Morman was standing about 100-150 feet East of the Bridge when she heard this transmission. Morman attempted to warn the O&G workers to clear the track by running towards the track and yelling "train." Scarfi was just exiting his vehicle when he saw Morman running towards the track, and

he testified that he yelled "emergency" into the radio in his truck. Scarfi then ran after Morman towards the tracks, and the test train reached the Bridge as he arrived at the tracks. Scarfi estimated that forty-five seconds elapsed from the time Morman exited her truck and began to run toward the Bridge and the time the Test Train was involved in the collision with O&G's equipment. As a result of the collision, Gregory Roberts died and Plaintiff Quintiliani suffered non-lethal injuries.

After the accident, Amtrak conducted an investigation into the events resulting in the collision. The train driver's post-accident toxicological results were negative. Amtrak's investigation revealed, however, that Morman had failed to fully comply with foul time procedures concerning O&G's false decking work within the manlifts on June 16, 2004.

II. Standard of Review

A party moving for summary judgment must establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56© [sic]; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "A party opposing a properly brought motion for summary judgment bears the burden of going beyond the pleadings, and 'designating specific facts showing that there is a genuine issue for trial.'" *Amnesty Am. v. Town of W. Hartford*, 288 F.3d 467, 470 (2d Cir. 2002) (quoting *Celotex*

Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). In determining whether a genuine issue has been raised, all ambiguities are resolved and all reasonable inferences are drawn against the moving party. *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); *Quinn v. Syracuse Model Neighborhood Corp.,* 613 F.2d 438, 445 (2d Cir. 1980). Summary judgment is proper when reasonable minds could not differ as to the import of evidence. *Bryant v. Maffucci,* 923 F.2d 979, 982 (2d Cir. 1991). "Conclusory allegations will not suffice to create a genuine issue." *Delaware & H.R. Co. v. Conrail,* 902 F.2d 174, 178 (2d Cir. 1990). Determinations as to the weight to accord evidence or credibility assessments of witnesses are improper on a motion for summary judgment as such are within the sole province of the jury. *Hayes v. N.Y. City Dep't of Corr.,* 84 F.3d 614, 619 (2d Cir. 1996).

III. Discussion

Amtrak moves for the entry of summary judgment with respect to Plaintiffs' claim for punitive damages. Amtrak also seeks a grant of partial summary judgment on the first cause of action in each of its third-party complaints against O&G in Case Nos. 04cv1318 and 04cv2195. More specifically, Amtrak requests that the Court enter judgment ordering O&G, pursuant to the parties' indemnification agreement, to defend and indemnify it as to Plaintiffs' claims. O&G argues that summary judgment should enter in its favor because the contract claims that

Amtrak alleges are barred by section 52-572k of the Connecticut General Statutes and the articulated public policy of the State. O&G also argues that the common law indemnification claims cannot be sustained because under the undisputed facts Amtrak cannot prove that O&G has exclusive control over the accident site and surrounding circumstances.

A. Punitive Damages

Amtrak concedes that Morman negligently performed her duties, but does not concede that any other employee conduct was inappropriate. Plaintiffs, however, argues [sic] that Amtrak's failure to reprimand other employees or admit inappropriate conduct beyond that of Morman results in Amtrak's adoption or ratification of their action for purposes of liability for their alleged misconduct. More specifically, Plaintiffs have highlighted the disputed issues of material fact regarding Amtrak's alleged reckless (1) performance of joint job briefings, (2) dispatch work, (3) training of flagman Morman, (4) use or lack of use of safety equipment, (5) failure to communicate with Morman regarding the need for foul time, and (6) recklessness in not issuing bulletin orders. These allegations are explained more fully below.

I. Joint Job Briefings

Plaintiffs argue that Amtrak revised its job briefing form in 1999 to include specific details regarding the fouling of tracks because it knew or

should have known that a revised form was a critical safety issue. They contend, however, that Amtrak did not train and instruct its flagmen and linemen so as to enforce the use of the revised form, and recklessly failed to replace the old job briefing form with the revised form. Furthermore, Plaintiffs point to the testimony of both Scarfi and Morman who testified that Amtrak had never instructed them to conduct joint job briefings. Plaintiffs argue that the death of Roberts and injuries of Plaintiff Quintiliani would have been avoided if they had conducted a joint job briefing because neither one of them had obtained foul time.

ii. Dispatch Work

Plaintiffs argue that the dispatcher transfer sheet for the evening of the accident provided that an extra train was running on the evening of June 15 and the morning of June 16, and that Amtrak's Assistant Chief Dispatcher ("ACD") failed to review the sheets before starting his shift as an ACD. Plaintiffs assert that Amtrak's ACD consciously chose not to call back Morman after learning that an additional train was operating in her vicinity and that if Amtrak's ACD had provided Morman with the correct information, either at the time of her initial phone call or through a follow-up conversation, the accident would not have occurred. Because Amtrak has not taken exception to the ACD's action or inaction, Plaintiffs allege that Amtrak has ratified and adopted their conduct.

iii. Morman's Training

Plaintiffs also argue that Amtrak failed to train Morman that electrical grounds could be applied to the track's overhead power system that did not foul the track. Plaintiffs argue that if she was aware of that possibility, she would have requested foul time.

iv. Reckless Use of Safety Equipment

Plaintiffs argue that Amtrak did not provide Supplemental Shunting Devices to its flagmen conductors, including Morman, or to its linemen, notwithstanding the fact that Amtrak's Roadway Protection Manual ("RWP Manual") requires that a SSD be used whenever equipment will be used to foul a track and Amtrak's Job Briefing form provides that SSDs "can and should be used any time equipment fouls the tracks." In support of this proposition, Plaintiffs point to the deposition testimony of Morman and Scarfi. Morman stated that "mostly no one" had been issued the shunting devices, and Scarfi testified that "[i]n our department we don't use them." Plaintiffs allege that the accident would not have occurred if SSDs were utilized because the train would have automatically stopped before it reached the bridge on which the accident occurred.

v. Amtrak Manager's Failure to Communicate with Morman Regarding the Need for Foul Time

Plaintiffs also argue that Amtrak's project manager knew that O&G's workers and equipment were going to foul the tracks at the Bridge site on the date of the accident. In support of this proposition, Plaintiffs proffered a document entitled "demo schedule" on which O&G had indicated that the tracks would need to be taken out of service to perform their work. Plaintiffs allege that Amtrak's Project Engineer was aware that O&G's employees were performing work requiring foul time, but consciously chose not to discuss the issue of foul time with Morman when she called to ask whether any extra trains were operating in her vicinity. Plaintiffs highlight the testimony of Project Engineer Bencivengo, who testified that there was no "doubt in [his] mind [that the] . . . false decking work with the manlifts was going to foul the tracks that night." Plaintiffs also point to the testimony of ACD Fournier, who explained that he had raised the issue of foul time with a person without a specific request for it. Plaintiffs argue that Amtrak's failure to take exception to the Engineer's conduct results in its ratification or adoption of his action.

vi. Amtrak's Failure to Issue Bulletin Orders

Plaintiffs also allege that Amtrak recklessly failed to issue a thorough bulletin order, which is issued weekly to all Amtrak train crews, flagmen,

linemen, and dispatchers, and includes, among other things, notification of potential safety hazards in various sections of the track. Plaintiffs allege that although Amtrak issued a bulletin order the week of the accident, it failed to inform all employees that construction work was being done at the location. Plaintiffs argue that if that information was contained in a bulletin order, the train would have to had stopped before passing the site of the Accident. In support of this proposition, they point to the testimony of Morman, who indicated that a bulletin order indicating that a test train was in the vicinity of the accident "would have made [her] aware that there was an unscheduled train out there that [she] would have to be aware of." (Morman dep. at 43.)

In its motion for summary judgment, Amtrak focuses solely on Morman's admittedly improper actions, and argues not only that her actions did not constitute wilful or wanton misconduct, but that there is no probative evidence to support a reasonable finding that high-ranking managements [sic] employees at Amtrak engaged in wilful or wanton misconduct or approved of such conduct by Morman or any other lower-level Amtrak employees. *See, e.g., Maisenbacker v. Society Concordeia,* 71 Conn. 369, 42 A. 67 (1899) (explaining that "no recovery of exemplary damages can be had against a principal for the tort of an agent or servant, unless the defendant expressly authorized the act as it was performed, or approved it, or was grossly negligent in hiring the agent or servant.") (internal quotation marks omitted).

Plaintiffs, however, as highlighted above, have proffered testimony in support of the proposition that Amtrak failed to properly train employees regarding the appropriate procedure for conducting joint job briefings, failed to issue a thorough bulletin order, failed to require the use of SSDs, and failed to train Morman that not all electrical grounds fouled a track. Even assuming that Amtrak never expressly authorized Morman's conduct as she performed it or approved of it, Plaintiffs have proffered evidence regarding Amtrak's, and not solely Morman's, allegedly reckless conduct. Plaintiffs have therefore established the presence of genuine issues of material fact as to whether Amtrak acted recklessly and whether its conduct "involved a risk to others which is substantially greater than that which is necessary to make . . . [its] conduct negligent." *See Matthiessen v. Vanech,* 266 Conn. 822, 831, 836 A.2d 394 (2003). Because a jury could properly award punitive damages if it determined that Amtrak acted recklessly, *see id.,* it would not be appropriate to summarily exclude the issue from the jury's consideration.

Amtrak also argues that Plaintiffs may not rely on opinion testimony from experts offered as an ultimate opinion of fact. Although the Court agrees with the legal foundation of Amtrak's argument, Plaintiffs in this case rely primarily on the testimony of Amtrak workers and not, as Amtrak argues, expert testimony.

Finally, Amtrak argues that Plaintiffs are barred from introducing evidence in support of any claim

involving allegations that Amtrak failed to have in place safety standards that are, in fact, the subject of FRSA regulations. More specifically Amtrak argues that Federal preemption doctrine would apply to any claim that the test train was operating at an excessive speed, as the train was indisputably traveling within the maximum speed limit at the time the Bridge first came into view. Amtrak further argues that the Federal preemption doctrine would similarly apply to any claim that Amtrak failed to have had in place safety standards that are, in fact, the subject of FRSA regulations. Amtrak, however, has not pointed to any particular FSRA regulation that could reasonably be considered to preempt Plaintiffs' claims addressed in this section. Amtrak's brief is limited to the two specific examples discussed above, and Plaintiffs do not raise either of those issues in their memorandum in opposition.

Amtrak's motion for summary judgment with respect to Plaintiff's punitive damages [Doc. No. 99] claims is denied.

B. Indemnification

O&G has moved, and Amtrak has opposed its motion, for summary judgment on Amtrak's claim for contractual indemnification are [sic] barred by the provisions of section 52-572k of the Connecticut General Statutes and the articulated public policy of the State of Connecticut. Amtrak has also filed a motion for summary judgment, which O&G opposed,

requesting that the Court grant it summary judgment in its favor with respect to its claims for contractual indemnification against O&G in Case Nos. 04cv1318 and 04cv2195.

The Court has already set forth the facts leading up to the accident. For purposes of resolving the present issue, however, additional background information is necessary. O&G was performing construction work on Amtrak's property pursuant to a Temporary Permit to Enter Property (hereinafter "the contract"). The permit authorized O&G to enter property owned and/or controlled by Amtrak "for purposes of reconstructing O.H. Bridge 78.02, I-95 (CDOT Project 42-122) in East Haven, State of Connecticut." The contract contained an indemnification provision providing in relevant part:

> INDEMNIFICATION
>
> The permittee shall defend, indemnify, and hold harmless Railroad, its officers, directors, employees, agents, servants, successors, assignees and subsidiaries, irrespective of their negligence or fault, from and against any and all losses and liabilities, penalties, fines, forfeitures, demands, claims[,] causes of action, suits, costs, and expenses incidental thereto (including costs of defense and attorney's fees), which any or all of them may hereinafter incur, be responsible for, or pay as a result of injury, death, disease or occupational disease to any person and for damage . . . to or loss of any property, including property of Railroad, arising out of or in any

> degree directly or indirectly caused by or resulting from activities of or work performed by Permittee, its officers, employees, agents, servants, contractors, subcontractors, or any other person acting for or by permission of Permittee. The foregoing obligation shall not extend to situations where the negligence or fault of Amtrak, its officers, directors, employees, agents, servants, successors, assigns, or subsidiaries is the sole causal negligence or fault, except that it shall so extend to injury, death, disease, or occupational disease to employees of Permittee, its agents, servants, contractors, subcontractors, or any other person acting for or by permission of the Permittee

O&G argues that the indemnification agreement is in direct violation of section 52-572k of the Connecticut General Statutes, which provides in relevant part:

> (a) Any covenant, promise, agreement or understanding entered into in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of any building, structure or appurtenances thereto including moving, demolition and excavating connected therewith, that purports to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of such promisee, such promisee's agents or employees, is against public policy and void, provided this

> section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by a licensed insurer.

O&G argues further that this statute is not preempted by 49 U.S.C. § 28103, which expressly permits Amtrak to enter into indemnification agreements. More specifically, 49 U.S.C. § 28103 (2005) provides:

> Limitations on rail passenger transportation liability
>
> (a) Limitations.
>
> (1) Notwithstanding any other statutory or common law or public policy, or the nature of the conduct giving rise to damages or liability, in a claim for personal injury to a passenger, death of a passenger, or damage to property of a passenger arising from or in connection with the provision of rail passenger transportation, or from or in connection with any rail passenger transportation operations over or rail passenger transportation use of right-of-way or facilities owned, leased, or maintained by any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State, punitive damages, to the extent permitted by applicable State law, may be awarded in connection with any such claim only if the plaintiff establishes by clear and convincing evidence that the harm that is the subject of the action was the result of conduct carried out by the defendant with a

conscious, flagrant indifference to the rights or safety of others. If, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, this paragraph shall not apply.

(2) The aggregate allowable awards to all rail passengers, against all defendants, for all claims, including claims for punitive damages, arising from a single accident or incident, shall not exceed $ 200,000,000.

(b) Contractual obligations. A provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims.

(c) Mandatory coverage. Amtrak shall maintain a total minimum liability coverage for claims through insurance and self-insurance of at least $ 200,000,000 per accident or incident.

(d) Effect on other laws. This section shall not affect the damages that may be recovered under the Act of April 27, 1908 (45 U.S.C. 51 et seq.; popularly known as the "Federal Employers' Liability Act") or under any workers compensation Act.

(e) Definition. For purposes of this section –

(1) the term "claim" means a claim made –

> (A) against Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State; or
>
> (B) against an officer, employee, affiliate engaged in railroad operations, or agent, of Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State;
>
> (2) the term "punitive damages" means damages awarded against any person or entity to punish or deter such person or entity, or others, from engaging in similar behavior in the future; and
>
> (3) the term "rail carrier" includes a person providing excursion, scenic, or museum train service, and an owner or operator of a privately owned rail passenger car.

O&G argues that the parties' indemnification agreement is void as violative of both section 52-572k of the Connecticut General Statutes and public policy. O&G contends further that 52-572k is not preempted by section 28103 because section 28103 is limited to claims by passengers, which Plaintiffs in this case were not. In support of this proposition, O&G points to the title of the statute, "Limitations on rail passenger transportation liability," and the language in subsection (a), which is specifically limited to punitive damages for claims by passengers. Although O&G concedes that the statutory definition of claims is not limited to passenger claims, it argues that the statute

can only reasonably be interpreted as applying to claims made by passengers. O&G also argues that the legislative history of the statute supports this limitation.

Amtrak counters that subsection (b), providing that "[a] provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims," is not limited to claims by passengers. Amtrak also points to the definition of "claims" set forth in subsection (e)(1)(A), which defines a "claim" as a claim made:

> (A) against Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State; or
>
> (B) against an officer, employee, affiliate engaged in railroad operations, or agent, of Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State

To determine whether federal law preempts a state statute, the Court looks to congressional intent. *FMC Corp. V. Holliday,* 498 U.S. 52, 56, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990). "Preemption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Id.* (*quoting Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 95, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983)). "Absent explicit pre-emptive language,

Congress' intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude state authority. *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 605, 111 S. Ct. 2476, 115 L. Ed. 2d 532 1991) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947). If a federal statute does not occupy an entire field, state law may be preempted to the extent that it renders compliance with the federal statute a physical impossibility or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (Internal quotation marks omitted).

The statute at issue does not contain an express preemption clause and is not so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. In fact, subsection (a) specifically applies to punitive damages "to the extent permitted by applicable state law." The question in this case is therefore whether section 52-572 is preempted to the extent that it renders compliance with section 28103 a physical impossibility or stands as an

obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

a. The Title of the Statute

The Court finds unpersuasive O&G's reliance on the title of the statute – "Limitations on rail passenger transportation liability" – for the proposition that the statute is limited to passenger claims and thus does not preempt section 52-572k of the Connecticut General Statutes in this case, as neither Roberts nor Quintiliani were Amtrak passengers in this case. It is undisputed that Amtrak is a provider of rail passenger transportation. The fact that the title of the statute refers to limitations on Amtrak's liability is not inconsistent [sic] subsection (a), which is subtitled "Limitations," and sets forth the standard by which punitive damages may be awarded "in a claim for personal injury to a passenger, death of a passenger, or damage to property of a passenger arising from or in connection with the provision of rail passenger transportation." Subsection (a) therefore specifically limits its applicability to claims by a passenger. Subsection (b), however, entitled "Contractual obligations," provides that "[a] provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims." The term "claims," which is defined in subsection (e)(1)(A) and (B), is not limited to claims by passengers but, rather, defines the class of persons against whom a claim may be made for purposes of 28103.

> The title of a statute and the heading of a section cannot limit the plain meaning of the text. [Citations omitted]. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

United States v. Roemer, 514 F.2d 1377, 1380 (2d Cir. 1975) (quoting *Brotherhood of Railroad Trainmen v. Baltimore R.R.*, 331 U.S. 519, 528-29, 91 L. Ed. 1646, 67 S. Ct. 1387 (1947)). The Court agrees with Amtrak that the statutory language is not ambiguous, and will not include language that the legislature chose to exclude. Because the legislature did not limit its definition of "claims" to those made by passengers, and because the use of the term passenger is used throughout the text of the statute, the Court concludes that subsection (b) is not limited to claims by passenger but, rather, applies to all "claims" as defined in subsection (e).

b. Preemption due to State law presenting an obstacle for enforcement of federal law

Having concluded that the text of the statute permits Amtrak to enter into indemnification agreements for all claims, not solely passenger claims, the Court must consider whether section 52-572k of the Connecticut General Statutes is preempted "to the extent that it renders compliance with the federal

statute a physical impossibility or stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (Internal quotation marks omitted).

O&G argues that the text of the original bill vis-a-vis the text of the statute as enacted establishes the legislature's intent not to pre-empt section 52-572k of the Connecticut General Statutes. The bill, as originally proposed, provided:

> Indemnification Obligations. Obligations of any party, however arising, including obligations arising under leases or contracts or pursuant to orders of an administrative agency, to indemnify against damages or liability for personal injury, death, or damage to property described in subsection (a) incurred after the date of the enactment of the Amtrak Reform and Privatization Act of 1997, shall be enforceable, notwithstanding any other statutory or common law or public policy, or the nature of the conduct giving rise to the damages or liability.

S. 738, 105th Cong. § 161 (1997).

The statute as enacted provides:

> Contractual obligation. A provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims.

49 U.S.C. § 28103(b) (2005).

O&G contends that the legislature's removal of the clause stating that the statute "shall be enforceable notwithstanding any other statutory [sic] of common law or public policy" compels the conclusion that it did not intend for the statute to preempt state law. O&G also points out, and Amtrak concedes, that the legislative history evidences the legislature's primary concern over Amtrak's ability to enter into indemnification agreements with the freight railroad companies over whose tracks Amtrak frequently operates, not with parties outside of that arrangement. That concern is not present in this case as the dispute is between Amtrak and a third-party with whom it entered into an indemnification agreement. Amtrak counters that, notwithstanding the legislature's primary concerns, the legislature chose broad language permitting Amtrak the authority to "enter into contracts that allocate financial responsibility for claims."

The Court's review of the legislative history confirms O&G's contention that the legislature was primarily concerned with Amtrak's ability to enter into indemnification agreements with the owners of rights-of-way. In fact, the bill initially proposes [sic] was intended to insulate Amtrak from the impact of *National Railroad Passenger Corp. V. Consolidated Rail Corp.*, 698 F. Supp. 951 (D.C. 1988), in which a federal district court voided an indemnification agreement between Amtrak and Conrail on the grounds that enforcing it would violate public policy because gross negligence on the part of the Conrail

locomotive engineer was alleged as the cause of the accident. The decision in Conrail resulted in freight railroads questioning the validity of their indemnification agreements, and the legislature was concerned that the freight railroads and Amtrak may, if an accident occurred, litigate with each other, resulting in higher settlement figures and judgments to plaintiffs, decreased goodwill between the contracting parties, and a less efficient and financially sound Amtrak. Furthermore, a House Report specifically references the facts of the Conrail case and highlights Amtrak's concern that the enforceability of future indemnification agreements was uncertain. Similarly, the Senate Report, although not specifically referencing the facts of the Conrail case, acknowledges "the possibility that state laws can nullify the indemnification contracts." More specifically, the Senate Report provided in relevant part:

> Subsection (b) of section 161 clarifies that rail passenger service indemnification agreements entered into by Amtrak and other parties are enforceable. Amtrak and the freight railroads believe legislation is necessary to confirm the enforceability of indemnification agreements. The indemnification agreements allocate the cost of liability among the agreement parties. As long as there is the possibility that state laws can nullify the indemnification contracts, Amtrak and a freight railroad could find themselves litigating against each other or concerning their obligations to injured third parties. Amtrak believes that such litigation

> inevitably would not only adversely impact its business relationship with its host freight railroads, but it would also lead to significantly higher outlays in settlements and judgments to litigants.

The Senate Report initially provides that the statute "clarifies that indemnification agreements entered into by Amtrak and *other parties* are enforceable." (Emphasis added.) The remainder of the Report relies upon Amtrak's testimony at hearings in which it expressed a fear of state laws nullifying indemnification agreements entered into between it and freight railroads. Although the Report explains that Amtrak and the freight railroads desired the legislation to confirm the enforceability of the agreements, and is focused on Amtrak's reason for seeking the provision, that fact does not compel the conclusion that Congress intended to limit the statute's applicability solely to those between Amtrak and freight railroads. The Court has already concluded that the language of the statute does not restrict the parties with whom Amtrak may enter into an indemnification agreement for claims. Furthermore, the legislative history of the statute reveals that Amtrak's financial condition had "reached a crisis stage" and that "Amtrak could reach bankruptcy by the spring of 1998" if it did not receive the statutory reforms and funding requested. The Court concludes that construing the statute in this case as not preempting section 52-572k would violate both the plain language and spirit of the statute. Accordingly, O&G's motion for summary judgment on Amtrak's contractual indemnification claim is denied.

IV. Conclusion

For the reasons stated above, Amtrak's motions for summary judgment with respect to Plaintiff's claim for punitive damages [Doc. No. 99] is **denied**. Amtrak's motion for summary judgment with respect to the enforceability of its contractual indemnification agreement with O&G [Doc. No. 89] is **granted**. O&G's motion for summary judgment [Doc. No. 149] on the contractual indemnification agreement is **denied**. Amtrak's claim for common law indemnification is denied as moot because the Court has already concluded that the contractual indemnification provision is valid

SO ORDERED.

Dated at New Haven, Connecticut, March 9, 2006.

/s/
Peter C. Dorsey
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Dennis Jacobs	**Catherine O'Hagan Wolfe**
CHIEF JUDGE	**CLERK OF COURT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of October two thousand and eight,

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O & G Industries, Inc.,

Third-Party-
Defendant-Appellant,

Hartford Fire Ins and
David Roberts

Plaintiffs,

Peter Quintiliani,
Laurel Quintiliani,

Consolidated-Plaintiff,

v.

National Railroad Passenger
Corp., also known as Amtrak,

Defendant-Third-Party-
Plaintiff-Appellee

ORDER

No. 06-4719-cv

(Filed Oct. 16, 2008)

Third Party Defendant Appellant O&G Industries, Inc. having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Franklin Perez
Frank Perez, Deputy Clerk

U.S.C.A. Const. Art. VI Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

49 U.S.C. § 28103. Limitations on rail passenger transportation liability

(a) Limitations. – (1) Notwithstanding any other statutory or common law or public policy, or the nature of the conduct giving rise to damages or liability, in a claim for personal injury to a passenger, death of a passenger, or damage to property of a passenger arising from or in connection with the provision of rail passenger transportation, or from or in connection with any rail passenger transportation operations over or rail passenger transportation use of right-of-way or facilities owned, leased, or maintained by any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State, punitive damages, to the extent permitted by applicable State law, may be awarded in connection with any such claim only if the plaintiff establishes by clear and convincing evidence that the harm that is the subject of the action was the result of conduct carried out by the defendant with a conscious, flagrant indifference to the rights or safety of others. If, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, this paragraph shall not apply.

(2) The aggregate allowable awards to all rail passengers, against all defendants, for all claims, including claims for punitive damages, arising from a single accident or incident, shall not exceed $200,000,000.

(b) Contractual obligations. – A provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims.

(c) Mandatory coverage. – Amtrak shall maintain a total minimum liability coverage for claims through insurance and self-insurance of at least $200,000,000 per accident or incident.

(d) Effect on other laws. – This section shall not affect the damages that may be recovered under the Act of April 27, 1908 (45 U.S.C. 51 et seq.; popularly known as the "Federal Employers' Liability Act") or under any workers compensation Act.

(e) Definition. – For purposes of this section –

(1) the term "claim" means a claim made –

(A) against Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State; or

(B) against an officer, employee, affiliate engaged in railroad operations, or agent, of Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State;

(2) the term "punitive damages" means damages awarded against any person or entity to punish or deter such person or entity, or others, from engaging in similar behavior in the future; and

(3) the term "rail carrier" includes a person providing excursion, scenic, or museum train service, and an owner or operator of a privately owned rail passenger car.

C.G.S. § 52-572k. Hold harmless clause against public policy in certain construction contracts

(a) Any covenant, promise, agreement or understanding entered into in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of any building, structure or appurtenances thereto including moving, demolition and excavating connected therewith, that purports to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of such promisee, such promisee's agents or employees, is against public policy and void, provided this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by a licensed insurer.

(b) The provisions of this section shall apply to covenants, promises, agreements or understandings entered into on or after the thirtieth day next succeeding October 1, 1977.

143 Cong.Rec. S4479-07

Congressional Record – Senate
Proceedings and Debates of the 105th Congress,
First Session
Wednesday, May 14, 1997

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mrs. HUTCHISON:

A bill to reform the statutes relating to Amtrak, to authorize appropriations for Amtrak, and for other purposes; to the Committee on Commerce, Science, and Transportation.

AMTRAK REFORM AND ACCOUNTABILITY ACT OF 1997

Mrs. HUTCHISON.

Mr. President, I think it is very important in this country that we have a national rail passenger system. Rail is a viable alternative transportation. We now have a bus system that is feeding into Amtrak stations so people can come from small communities on the bus, into the Amtrak station, and go anywhere in the country as long as we keep our national system. You can go from Marshall, TX, to Chicago, IL, or to San Antonio and then to Los Angeles or all the way to Florida. It is really an exciting opportunity.

However, Mr. President, the national rail passenger service that we have now is really just an experiment. It really does not work very well, through no fault of the people who run it. Tom Downs is actually

doing a terrific job. But we in Congress have put so many constraints and mandates on him that he cannot possibly compete to survive.

So, in fact, it is time to get the railroad back on track. It is time to get this railroad right. We can do it if Congress will correct some of the problems that we have put on this rail passenger train and let them compete. We have told them, "Run a good railroad," but we have tied one arm behind their back. So now it is time to let them compete, with the help of the bill I am introducing, most of which passed out of the Commerce Committee last year.

I am chairman of the Surface Transportation Subcommittee. It is in my purview to reauthorize Amtrak, and I want to reauthorize it and reform it so that it can compete and, hopefully, by the year 2002, there will not have to be operational subsidies from the taxpayers of America. But there is no question this will fail unless we have these reforms that will allow Amtrak to operate more like a business.

So, what are we trying to do? We are trying to have a system that is up and going without operational subsidies by the year 2002. Many of my friends say, "I do not know why we should help Amtrak. Why should we have taxpayer subsidies of Amtrak when all the other transportation modes do not need taxpayer subsidies?" Every transportation mode has taxpayer subsidies. Part of the reason we have mobility in our country is because we subsidize highways,

we subsidize airports, we now also subsidize trains, and it does provide mobility.

I want to try to get Amtrak back on track, get it to run right, and see if we can have a passenger rail system that is dependable, that provides good service and viable transportation options to all the people of our country, whether they are elderly and do not want to drive, whether they just cannot drive, whether they do not like to fly, whether they live in a small community that does not have any kind of passenger service. We want people to have this mobility.

How are we going to do it? The Amtrak reform bill, first, will repeal two laws that have been very expensive. One is the 6-year termination provisions for anyone who is employed at Amtrak, if a line is shut down. Now, I am sure there are a lot of people in America that would like to have a 6-year termination agreement that says if you lose your job, you get 6 years full pay. That would be nice, but it is not realistic, and it certainly does not meet today's standards. Even many Amtrak employees tell me that they realize this is out of line. It is a congressional mandate that they have a 6-year termination agreement, but they know that Amtrak cannot compete with that kind of agreement in place. It is just much too expensive. They would rather keep their jobs. They love what they are doing. They want to keep their jobs rather than have a 6-year termination agreement.

So we want to require Amtrak to have free and open bargaining with its unions in the absence of a

Government mandate of a 6-year termination agreement. In fact, it would be free and open like every other union negotiation is in this country. That is fair, and I think most Amtrak employees agree that is fair. Let them sit at the bargaining table with open and fair negotiations, and they will be able to get the best that the market can bear while still having a good job, a viable job, and doing a service for the people of our country.

This bill will also extinguish the prohibition on contracting out. One of the things that Tom Downs tells me they need is the ability to make the decision if they want to contract out in order to save costs, because if we are going to tell Mr. Downs that he has to run a tight ship, we cannot put mandates on him that are not anywhere else in any other competitive system in our country and expect him to do a good job. We have to take the shackles off.

We also must give him the ability to have some liability reform. He says one of the most expensive things he has to deal with is liability and not being able to have the right of indemnification with the people that own the tracks Amtrak uses. We need to have liability reform, and, in fact, this was passed out of the Commerce Committee last year. Like last year's bill, the liability reform in my bill would have caps on punitive damages for two times compensatory damages or $250,000, whichever is greater.

In fact, these kinds of liability limits, I think, are quite reasonable. Many States are enacting these

kinds of liability limits, in particular for publicly assisted transportation services. It allows a person who has been wrongly injured to have compensation for that, but it puts some limitation so there will be a budget on it, so that there will be some reliability about how much you have to put

* * *

benefits applicable to employees of Amtrak is extinguished, including all provisions of Appendix C-2 to the National Railroad Passenger Corporation Agreement, signed July 5, 1973.

(c) SPECIAL EFFECTIVE DATE.-Subsections (a) and (b) of this section shall take effect 180 days after the date of the enactment of this Act.

(d) NONAPPLICATION OF BANKRUPTCY LAW PROVISION. – *Section 1172(c) of title 11, United States Code*, shall not apply to Amtrak and its employees.

SUBTITLE D-USE OF RAILROAD FACILITIES

SEC. 161. LIABILITY LIMITATION.

(a) AMENDMENT. – Chapter 281 of title 49, United States Code, is amended by adding at the end the following new section:

"s28103. Limitations on rail passenger transportation liability

"(a) LIMITATIONS. –

"(1) Notwithstanding any other statutory or common law or public policy, or the nature of

the conduct giving rise to damages or liability, a contract between Amtrak and its passengers, the Alaska Railroad and its passengers, or private railroad car operators and their passengers regarding claims for personal injury, death, or damage to property arising from or in connection with the provision of rail passenger transportation, or from or in connection with any operations over or use of right-of-way or facilities owned, leased, or maintained by Amtrak or the Alaska Railroad, or from or in connection with any rail passenger transportation operations over or rail passenger transportation use of right-of-way or facilities owned, leased, or maintained by any high-speed railroad authority or operator, any commuter authority or operator, or any rail carrier shall be enforceable if –

"(A) punitive or exemplary damages, where permitted, are not limited to less than 2 times compensatory damages awarded to any claimant by any State or Federal court or administrative agency, or in any arbitration proceeding, or in any other forum or $250,000, whichever is greater; and

"(B) passengers are provided adequate notice of any such contractual limitation or waiver or choice of forum.

"(2) For purposes of this subsection, the term 'claim' means a claim made directly or indirectly –

"(A) against Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, or any rail carrier including the Alaska Railroad or private rail car operators; or

"(B) against an affiliate engaged in railroad operations, officer, employee, or agent of, Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, or any rail carrier.

"(3) Notwithstanding paragraph (1)(A), if, in any case in which death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, a claimant may recover in a claim limited by this subsection for actual or compensatory damages measured by the pecuniary injuries, resulting from such death, to the persons for whose benefit the action was brought, subject to the provisions of paragraph (1).

(b) INDEMNIFICATION OBLIGATION. – Obligations of any party, however arising, including obligations arising under leases or contracts or pursuant to orders of an administrative agency, to indemnify against damages or liability for personal injury, death, or damage to property described in subsection (a), incurred after the death of the enactment of the Amtrak Reform and Accountability Act of 1997, shall be enforceable, notwithstanding any other statutory or common law or public policy, or the nature of the conduct giving rise to the damages or liability.

(b) CONFORMING AMENDMENT. – The table of sections of chapter 281 of title 49, United States Code, is amended by adding at the end the following new item:

"28103. Limitations on rail passenger transportation liability."

TITLE II-FISCAL ACCOUNTABILITY

SEC. 201. AMTRAK FINANCIAL GOALS.

Section 24101(d) of title 49, United States Code, is amended by adding at the end thereof the following: "Amtrak shall prepare a financial plan to operate within the funding levels authorized by section 24104 of this chapter, including budgetary goals for fiscal years 1998 through 2002. Commencing no later than the fiscal year following the fifth anniversary of the Amtrak Reform and Accountability Act of 1997, Amtrak shall operate without Federal operating grant funds appropriated for its benefit.".

SEC. 202. INDEPENDENT ASSESSMENT.

(a) INITIATION. – Not later than 15 days after the date of enactment of this Act, the Secretary of Transportation shall contract with an entity independent of Amtrak and not in any contractual relationship with Amtrak and of the Department of Transportation to conduct a complete independent assessment of the financial requirements of Amtrak through fiscal year 2002. The entity shall have

demonstrated knowledge about railroad industry accounting requirements, including the uniqueness of the industry and of Surface Transportation Board accounting requirements.

(b) ASSESSMENT CRITERIA. – The Secretary and Amtrak shall provide to the independent entity estimates of the financial requirements of Amtrak for the period described above, using as a base the fiscal year 1997 appropriation levels established by the Congress. The independent assessment shall be based on an objective analysis of Amtrak's funding needs.

* * *

143 Cong.Rec. S4944-01

Congressional Record – Senate
Proceedings and Debates of the 105th Congress,
First Session
Thursday, May 22, 1997

CONCURRENT RESOLUTION ON THE BUDGET

The Senate continued with the consideration of the concurrent resolution.

The PRESIDING OFFICER.

The Senator from Kansas is recognized for 10 minutes.

Mr. ROBERTS.

I thank the Chair. I thank the distinguished chairman of the Budget Committee.

Mr. President, I rise in support of the overall balanced budget plan and rise expressing some reservations in regard to many of the amendments that we are considering, the pending amendments; some 45 of them, as a matter of fact.

If nothing else, I wanted to pay a personal tribute in behalf of the taxpayers of Kansas and thank the chairman of the Budget Committee for his leadership, his perseverance, his patience. He has the patience of Job. I must confess, having come from the lower body, as described by Senator BYRD, and being the chairman of the House Agriculture Committee, I am not

sure I had the patience of Senator DOMENICI. We now spell "persevere" D-o-m-e-n-i-c-i.

How many hours, I ask of the chairman, if he could respond, how many days, even years, have been involved? Does he have any estimate in regard to the hours he has spent late, early-he and Chairman KASICH of the House? If he gives me an estimate, what is it? 10,000?

Mr. DOMENICI.

On this agreement itself, just this year, I would estimate 1,000 hours.

Mr. ROBERTS.

1,000 hours. I said hours and minutes; even years.

This has been the third year on this particular budget plan. This is the culmination of 3 years of hard work that the Senator from New Mexico has put in, all members of the Budget Committee, as well as the staff. This has been a Lonesome Dove Trail ride. I hope we get through the tall grass and balanced budget with all of our body parts intact. If we do, the chairman will get most of the credit.

* * *

Without objection, it is so ordered.

The amendment, as modified, is as follows:

At the appropriate place, insert the following:

SEC. . SENSE OF THE SENATE REGARDING ASSISTANCE TO AMTRAK.

(a) FINDINGS. – The Senate finds that –

(1) Amtrak is in a financial crisis, with growing and substantial debt obligations approaching $2 billion;

(2) Amtrak has not been authorized since 1994:

(3) the Senate Committee on Commerce, Science, and Transportation favorably reported legislation to reform Amtrak during the last two Congresses, but no legislation was enacted;

(4) the Finance Committee favorably reported legislation in the last Congress that created a dedicated trust fund for Amtrak, but no legislation was enacted;

(5) in 1997 Amtrak testified before the Congress that it cannot survive beyond 1998 without comprehensive legislative reforms and a dedicated source of capital funding; and

(6) Congress is obligated to invest Federal tax dollars responsibly and to reduce waste and inefficiency in Federal programs, including Amtrak.

(b) SENSE OF THE SENATE.-It is the Sense of the Senate that the provisions of this resolution assume that:

(1) Legislative reform is urgently needed to address Amtrak's financial and operational problems.

(2) It is fiscally irresponsible for Congress to allocate additional Federal dollars to Amtrak, and to distribute money from a new trust fund, without providing reforms requested by Amtrak to address its precarious financial situation.

(3) The distribution of money from any new fund to finance an intercity rail passenger fund should be implemented in conjunction with legislation to reauthorize and reform the National Rail Passenger Corporation.

Mr. MCCAIN.

Mr. President, my amendment states that if legislation is enacted to establish an intercity passenger rail fund, as this budget resolution would make room for, the distribution of any new money should be in conjunction with legislation to reauthorize and reform the National Rail Passenger Corporation, better known as Amtrak. Money alone, cannot fix all of Amtrak's financial and operational problems. This amendment does not attempt to kill Amtrak or block its funding. It simply attempts to establish some level of fiscal accountability before the taxpayers are forced to pay $400 to $500 million more to fund Amtrak capital subsidies.

We have an obligation to the American public to invest our Federal dollars wisely. We should reduce waste and inefficiency and allow Amtrak to achieve greater fiscal accountability. Statutory reforms are necessary if Amtrak is to increase efficiencies, reduce

costs, and lessen its dependence on Federal assistance.

Earlier this week, I met with Delaware's Governor, Tom Carper, who serves on the Amtrak board of directors. Governor Carper articulated clearly to me Amtrak's plan to turn its financial condition around. He talked about the need for capital investment and his support for establishing a trust fund for Amtrak. He also talked about the importance of legislative reforms.

I may not agree with Governor Carper's views on the role that the Federal Government should continue to play in supporting Amtrak. But, it was refreshing to hear from someone close to Amtrak's operations discuss the critical need for statutory reforms – including labor and liability reforms – and not just the need for more money.

Mr. President, Amtrak has not been authorized since 1994. The Commerce Committee has reported out reform legislation during the last two Congresses. But, instead of meeting our authorizing obligations, Congress has found it easier to just keep throwing good money at an inefficient operation. This fiscally irresponsible practice must stop.

Last week, Senator HUTCHISON, the chairman of the Surface Transportation and Merchant Marine Subcommittee, introduced S. 738, the Amtrak Reform and Accountability Act. That bill proposes to reauthorize Amtrak for 5 years and provide comprehensive reforms to allow Amtrak to operate more like a

business. In short, it provides all the things Amtrak's president, Tom Downs, says are needed in order for Amtrak to meet its glide path to zero Federal operating subsides [sic] by 2002.

The Commerce Committee is prepared to move Senator HUTCHISON'S bill during our very next executive session. We will be ready for floor action as soon as the leadership can agree on a schedule. Members can offer amendments and cast their votes. But we are committed to debate reform legislation on the Senate floor.

I cannot understand how any Member could seriously argue that reform legislation should not be tied to any future "pot of gold" for Amtrak. Let me remind my colleagues that it is Amtrak that has said that money will not solve all its problems.

For the past several years, Amtrak's president, Tom Downs, has testified before Congress explaining the three things needed to turn Amtrak around: Internal Restructuring; comprehensive legislative reforms; and a dedicated source of capital funding. And, just yesterday morning, during a DOT oversight hearing of the Commerce Committee, the GAO and the Office of Inspector General testified on the serious challenges Amtrak faces to achieving operating self-sufficiency.

Mr. President, since 1983 I have listened to Amtrak officials talk about their plans to turn Amtrak into a viable operation. I imagine they've talked about it for 26 years. Amtrak says they can operate

more efficiently and reduce the need for Federal assistance if Congress gives them the tools they have requested. Therefore, it would be extremely irresponsible to give Amtrak a substantial increase in Federal assistance and not remove some of the statutory burdens that are the root cause of many of their financial woes today.

If Amtrak is given new money without reforms, I can hear them in the year 2002. They'll try to convince me how Congress still should continue subsidizing Amtrak because Congress never gave them what they said they needed. Well, enough is enough. If Amtrak is going to receive Federal assistance, let's make sure they also have the ability to increase efficiencies, reduce costs, and operate more like a business.

Amtrak is in a financial crisis. Without comprehensive legislative reforms, it is business as usual. And today, that business faces a debt load fast approaching $2 billion.

Mr. President, I do not support a never-ending drain on the Federal taxpayers in funding a passenger rail system that serves only 500 locations across the country. But, if the collective wisdom of Congress believes we should continue to invest billions of dollars in a passenger system that serves less than 1 percent of the traveling public, I am going to do all I can to ensure such investment is as fiscally sound at [sic] possible. Turning on a new Amtrak funding spigot

absent comprehensive operational reforms would be wasteful and careless.

I urge my colleagues to support my amendment.

Mr. ROTH.

Mr. President, I support Senator MCCAIN's Sense of the Senate. I agree with my colleague from Arizona that Amtrak needs reforms. Amtrak must be able to operate more like a business. Senator HUTCHISON has recently introduced a major reform package which I support. Amtrak needs these reforms and they must be enacted this year. It is also very clear that Amtrak needs an adequate and reliable source of capital funding. Amtrak is currently borrowing to meet payroll and if additional capital funding is not provided, GAO and Amtrak have testified that the company will not survive past mid-1998. The key to Amtrak's future is both a legislative reform package and a secure source of capital funding.

Given the immediate financial crisis Amtrak is facing, Congress cannot wait a moment longer. To be viable Amtrak will need both a secure source of capital funding and a reauthorization and reform bill this year. It is my goal to see both bills enacted this year. I do not doubt Senator MCCAIN's ability to get the reform bill passed in the Senate and enacted this year. And, as I have stated on the floor many times, it is one of my priorities to give Amtrak a secure source of capital funding this year. Both bills are essential and I believe both should be implemented in conjunction with each other. We cannot lose our national

passenger rail system. If something is not done to give Amtrak the capital funds and the reforms it needs, Amtrak will not survive. This is not an idle threat. GAO has testified before my committee that this is the case. Amtrak President Tom Downs has testified that the company would not survive past 1998. Amtrak's financial report proves it. The question before us is whether or not we want this country to have a national passenger rail system. If we want a national system, we must give Amtrak a secure capital funding source to allow it to operate more like a business.

Let me take a few minutes to explain why I fought to include the Amtrak reserve fund in the budget resolution. And may I also say at this time that Senators DOMENICI and LAUTENBURG have been extremely helpful in securing this compromise language for me.

Senator DOMENICI and I have worked together to develop a compromise on how to finance a secure source of funding for Amtrak. Out of these discussions we developed an Amtrak reserve fund which would allow for the spending caps for Amtrak to be raised by the amount of revenue raised to finance this fund. It is the first step, and a very critical step, for ensuring that Amtrak receives the capital funding it needs to survive.

Mr. President, all major modes of transportation have a dedicated source of capital funding, except for intercity passenger rail. Amtrak needs a similar

capital funding source to bring its equipment, facilities, and tracks into a state of good repair. Much of Amtrak's equipment and infrastructure has exceeded its projected useful life. The costs of maintaining this aging fleet and the need to modernize and overhaul facilities through capital improvements to the system are serious financial challenges for Amtrak. This provision is the first step in helping to reverse these problems and give Amtrak the resources necessary to meet its capital investment needs.

I believe that it is time for Congress to reverse our current policy that favors building more highways at the expense of alternative means of transportation, such as intercity passenger rail. Despite rail's proven safety, efficiency, and reliability in Europe, Japan, and elsewhere, intercity passenger rail remains severely underfunded in the United States. In fact, over half of the Department of Transportation's spending authority is devoted to highways and another quarter to aviation; rail still ranks last with roughly 3 percent of total spending authority.

If this Congress wants a national passenger rail system, we will have to properly fund the system. Amtrak has not been able to make sufficient capital investments in the past through annual, but inadequate appropriation. I am pleased that the Senate now recognizes that a new funding mechanism is needed for Amtrak. Under this budget agreement, Amtrak would finally receive similar treatment as other modes of transportation.

Mrs. HUTCHISON.

Mr. President, I thank the Senator from Arizona for his efforts. I appreciate his leadership as full committee chairman because he makes it possible for members to move important legislation in a timely fashion, and I am pleased to hear his commitment to move, Amtrak reauthorization and reform legislation, as soon as possible.

In particular, he is exercising great leadership on the issue of Amtrak. I know he personally has doubts about our current passenger rail policy but, as chairman, has not acted to impede the will of the Commerce Committee or Congress to continue the national passenger rail system. He does, however, insist these the policies and their implementation be responsible. I commend him for that, appreciate the leadership it represents, and will work closely with him to that end.

I support this amendment because I believe Amtrak must have both reform and capital funding. I commend Senator ROTH for his commitment to authorize a capital fund for Amtrak and will work with him to see that it occurs. He is a cosponsor of my Amtrak reauthorization bill and am certain he will make a similar commitment to help achieve its passage.

I believe we agree that the passage of both of these bills is necessary to sustain Amtrak. Increased Amtrak funding alone is not enough; nor are reforms without adequate funding. However, providing the

funding without the reforms not only shortchanges Amtrak, it shortchanges the taxpayer.

I fully share the sense of this Senate that appropriations from the new intercity rail fund should go to a reformed and reauthorized Amtrak. I urge all of my colleagues to work with me to pass Amtrak reform legislation as soon as possible in fulfillment of this resolution.

* * *

143 Cong.Rec. S7739-01

Congressional Record – Senate
Proceedings and Debates of the 105th Congress,
First Session
Thursday, July 17, 1997

REAUTHORIZING AMTRAK APPROPRIATIONS

Mr. HOLLINGS.

Mr. President, I support S. 961, the administration's bill to reauthorize appropriations for the National Rail Passenger Corporation, better known as Amtrak. Amtrak is a necessary part of a national transportation system. It has demonstrated its popularity with the traveling public and, more importantly, its ability to provide safe, efficient transportation at reasonable prices.

My South Carolina constituents have made it quite clear that they want Amtrak to prosper, and wish it expanded, not terminated or forced to operate under unreasonable restrictions or reduced to the status of a regional railroad. The citizens of South Carolina and the Nation demand a first class rail passenger transportation service. This is Amtrak's mission, and its promise.

S. 961 puts Amtrak on the path to fulfilling that promise. The bill concentrates on what is important, the operational and financial viability of Amtrak, and is not diverted from its goal by including provisions

that are divisive and will not save Amtrak significant money or allow it to maximize its revenues.

Specifically, S. 961 does not include a provision which would impose so-called caps on the punitive damages available to passengers involved in accidents while aboard Amtrak trains. Other bills which purport to aid Amtrak would cap punitive damages to twice compensatory damages or $250,000, whichever is greater. While I understand the necessity of any business to reduce costs, placing liability caps against passengers will not significantly improve Amtrak's bottom line. The General Accounting Office's (GAO) highest estimate of savings from such caps is less than one percent of Amtrak's capital funding needs.

Moreover, the provision ignores the value of punitive damages to the public. With punitive damages a possibility, Amtrak has the incentive to properly train its personnel, invest in safe equipment, and reward safe operations. Finally, such a provision is unnecessary. Punitive damages have never been awarded against Amtrak.

S. 961 puts the emphasis where it should be, on authorizing appropriations of $5 billion for Amtrak over the next six years. It is this money that is needed to fund Amtrak operations, equipment purchases, much needed capital improvements, and expanded services, not the small amount any liability cap will provide the rail carrier. We would all like to avoid paying Government subsidies for this service,

but we cannot ignore that the provision of transportation infrastructure is a necessary function of Government, whether involving highways, bridges, airports, mass transit, or rail. It should be noted that a 1994 study of central government subsidies of rail transportation showed that U.S. subsidy levels are 35th in the world, well below those of Europe.

S. 961 also avoids the unnecessary controversy brought about by an effort to provide indemnification for freight railroads over whose tracks Amtrak largely operates. Some argue that freight railroads need protection from accidents between their trains and Amtrak trains. Whatever the merits of indemnifying particular freight railroads in particular cases, what has been proposed in several bills is the complete indemnification of any freight railroad for any accident, regardless of cause or fault. In other words, if a freight railroad employee acts intentionally or with gross negligence and causes an accident, Amtrak would pay for that accident, most likely with tax dollars paid by the American people. The American people would be forced to pay for the mistakes of a multi-million dollar private corporation. This is indefensible.

In 1987, a Conrail engineer, after smoking marijuana, drinking beer, and disabling safety equipment, ran his Conrail locomotives into the rear of an Amtrak train near Chase, MD. The disaster cost 16 lives and 175 injuries. In the resulting litigation, a court found the conduct of the engineer to involve gross negligence. The accident cost $130 million. If the full

indemnification provision had been in effect at that time, Amtrak, which was completely blameless, would have been required to pay all of the damages associated with that accident. Amtrak would have had to pay the cost of an accident beyond its control and that it was powerless to prevent. There is no more potent example of the unfairness of such a provision.

One other unacceptable provision that was wisely omitted from S. 961 is a so-called sunset trigger provision. Unfortunately, such a provision is contained in S. 738, the Amtrak bill recently ordered reported by the Commerce Committee. The provision establishes a new Amtrak Reform Council <ARC> to investigate Amtrak's financial condition, make a determination of Amtrak's ability to meet its financial goals, and present a report on Amtrak's condition to the Congress. If the ARC determination is negative, Amtrak is required to prepare a liquidation plan and the ARC is required to prepare a plan for restructuring Amtrak. Both plans are sent to Congress and if, within 90 days, the Congress does not enact the restructuring plan, the liquidation plan must be implemented. Thus, to kill Amtrak, any action to save it need only be delayed by its congressional opponents for 3 months.

Under this provision, Amtrak could be liquidated without either House of Congress taking any responsibility by voting for or against the liquidation plan. There would not have to be any debate in Congress on Amtrak or the liquidation plan. No questions of Amtrak's worth or importance and no indication of

the consequences of eliminating Amtrak would have to be addressed. A transportation program of vital importance to millions of Americans would be eliminated without another word. This is nothing more than Congress evading its responsibilities and should not be allowed.

S. 961 is the right approach. We should insist that Amtrak run its operations in a business-like, efficient manner. And we should conduct vigorous oversight. However, we should not complicate its authorization legislation with extraneous provisions, and any decision to discontinue passenger rail service in this country must be made in full view and with complete information on the economic and social costs of doing so.<>

* * *

H.R. REP. 105-251

AMTRAK REFORM AND PRIVATIZATION ACT OF 1997

HOUSE REPORT NO. 105-251
September 17, 1997

Mr. Shuster, from the Committee on Transportation and Infrastructure, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany H.R. 2247]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 2247) to reform the statutes relating to Amtrak, to authorize appropriations for Amtrak, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Amtrak Reform and Privatization Act of 1997".

TITLE I – PROCUREMENT REFORMS

SEC. 101. CONTRACTING OUT.

(a) Amendment. – *Section 24312(b) of title 49, United States Code*, is amended to read as follows:

"(b) Contracting Out. – (1) When Amtrak contracts out work normally performed by an employee in a bargaining unit covered by a contract between a labor organization and Amtrak, Amtrak is encouraged to use other rail carriers for performing such work.

"(2)(A) Amtrak may not enter into a contract for the operation of trains with any entity other than a State or State authority.

"(B) If Amtrak enters into a contract as described in subparagraph (A) –

"(i) such contract shall not relieve Amtrak of any obligation in connection with the use of facilities of another entity for the operation covered by such contract; and

"(ii) such operation shall be subject to any operating or safety restrictions and conditions required by the agreement providing for the use of such facilities.

"(C) This paragraph shall not restrict Amtrak's authority to enter into contracts for access to or use of tracks or facilities for the operation of trains.".

(b) Effective Date. – Subsection (a) shall take effect 254 days after the date of the enactment of this Act.

SEC. 102. CONTRACTING PRACTICES.

(a) Below – Cost Competition. – *Section 24305(b) of title 49, United States Code*, is amended to read as follows:

"(b) Below – Cost Competition. – (1) Amtrak shall not submit any bid for the performance of services under a contract for an amount less than the cost to Amtrak of performing such services, with respect to any activity other than the provision of intercity rail passenger transportation, commuter rail passenger transportation, or mail or express transportation. For purposes of this subsection, the cost to Amtrak of performing services shall be determined using generally accepted accounting principles for contracting.

"(2) Any aggrieved individual may commence a civil action for violation of paragraph (1). The United States district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce paragraph (1). The court, in issuing any final order in any action brought pursuant to this paragraph, may award bid preparation costs, anticipated profits, and litigation costs, including reasonable attorney and expert witness fees, to any prevailing or substantially prevailing party. The

court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

"(3) This subsection shall cease to be effective on the expiration of a fiscal year during which no Federal operating assistance is provided to Amtrak.".

(b) Through Service in Conjunction With Intercity Bus Operations. – (1) *Section 24305(a) of title 49, United States Code*, is amended by adding at the end the following new paragraph:

"(3)(A) Except as provided in subsection (d)(2), Amtrak may enter into a contract with a motor carrier of passengers for the intercity transportation of passengers by motor carrier over regular routes only –

"(i) if the motor carrier is not a public recipient of governmental assistance, as such term is defined in section 13902(b)(8)(A) of this title, other than a recipient of funds under section 5311 of this title;

"(ii) for passengers who have had prior movement by rail or will have subsequent movement by rail; and

"(iii) if the buses, when used in the provision of such transportation, are used exclusively for the transportation of passengers described in clause (ii).

"(B) Subparagraph (A) shall not apply to transportation funded predominantly by a State or local government, or to ticket selling agreements.".

(2) *Section 24305(d) of title 49, United States Code*, is amended by adding at the end the following new paragraph:

"(3) Congress encourages Amtrak and motor common carriers of passengers to use the authority conferred in sections 11322 and 14302 of this title for the purpose of providing improved service to the public and economy of operation.".

PURPOSE AND SUMMARY

On July 24, 1997, H.R. 2247, the Amtrak Reauthorization and Privatization Act of 1997 was introduced. Amtrak's previous authorization expired on September 30, 1994. H.R. 2247 authorizes appropriations totaling $3.37 billion over the fiscal years 1998-2000 for Amtrak and represents a thorough overhaul of Amtrak's authorizing statutes, aimed at reducing costs and eliminating Federal micromanagement of Amtrak's operations.

H.R. 2247 provides Amtrak with far greater flexibility in managing its work force. H.R. 2247 calls for an accelerated bargaining process on the issue of contracting out work and on the issue of labor protection. At the end of the bargaining process (254 days in total), both Amtrak's statutory ban on contracting out work other than food and beverage service and pre-enactment contract terms that implement that ban, as well as all statutory and contract terms relating to labor protection, would lapse. At that point, labor and management could employ "self help" measures

under the Railway Labor Act. Any union with a current contract moratorium in force at the date of enactment would begin negotiations when the moratorium expires.

Also, H.R. 2247 provides that Surface Transportation Board (STB) (New York Dock) labor protection standards do not apply in the event of an Amtrak bankruptcy and revises the Northeast Rail Service Act to restrict but not eliminate "flowback" labor protection rights for employees who joined Amtrak from Conrail or its predecessor railroads.

The bill also provides Amtrak with flexibility in designing and managing its route system. H.R. 2247 repeals Amtrak's current obligation to operate the "basic system" of routes (consisting primarily of routes inherited from private railroads in 1971), unless excused by financial emergency or insufficient funding. Under the legislation, Amtrak would decide the merits of various routes according to commercial potential, not arbitrary statutory preference. Further, the bill eliminates current statutory criteria for evaluating routes and services, and the statutory matching formula that currently applies to State-requested service. To assist the States in contributing to continued rail service in cases where Amtrak is no longer able to offer service entirely on its own, the bill provides for interstate compact pre-approval, allowing the States to enter into long-term agreements with each other that ensure stability in the provision of rail service.

H.R. 2247 establishes a new procedure by which commuter authorities on the Northeast Corridor would compensate Amtrak for their use of the Corridor. Under the current practice, commuter authorities pay Amtrak only for the incremental costs of their use of the Corridor, but not for the shared capital costs. Outside the Northeast Corridor, commuter authorities simply negotiate the terms of their use of right-of-way with the owner of the property, whether a State entity or a private freight railroad. H.R. 2247 would place Northeast Corridor commuter operators on the same footing as their off-Corridor counterparts by repealing the statutory formula by which commuters reimburse Amtrak. Henceforward, Amtrak and the commuter authorities would negotiate the terms for reimbursement according to standard business practices. Any disputes that could not be resolved by the parties would be submitted to binding arbitration, with the STB available as an arbitrator if chosen by the parties.

Further, H.R. 2247 contains dramatic financial reforms that will afford Amtrak many more options in obtaining private financing. The bill calls for Amtrak to redeem all of its common stock (now held with one exception by freight railroads), and removes the voting rights and liquidation preference of the preferred stock now held exclusively by the Department of Transportation. DOT's note and mortgage on the Northeast Corridor are extinguished as well. This would have the benefit of removing DOT as a preferred

creditor who stands ahead of other potential commercial lenders in all Amtrak financial transactions.

H.R. 2247 also provides for a new management structure at Amtrak to deal with Amtrak's financial crisis. Sixty days after enactment, the existing board of directors would be replaced by a 4-year emergency reform board to be appointed by the President in consultation with Congress. Board members would be required to have background and expertise in transportation and business management and would be confirmed by the Senate.

The bill also resolves an issue of long-standing concern to Amtrak and to the freight railroads over which Amtrak operates and removes a major barrier to the expansion of passenger rail service-exposure to tort liability from passenger train accidents. This exposure results from the usually involuntary participation of the freight railroad as a provider of facilities and infrastructure. H.R. 2247 establishes two limits on tort liability exposure of freight and passenger carriers who operate or provide facilities for rail passenger service: (1) a cap of $250,000 or three times economic damages, whichever is greater, on punitive or exemplary damages, and; (2) a cap of $250,000 above economic losses per claimant on noneconomic damages. The bill also affirms that indemnity contracts between a passenger rail operator and any other party are fully enforceable without regard to any other law or public policy.

Finally, to assist Amtrak's efforts to reach financial stability and eventual removal from dependence on federal assistance, H.R. 2247 calls for the establishment of 7-member advisory council of business experts who have no affiliation with the railroad industry, Amtrak, or the United States government. Called the Temporary Rail Advisory Council (TRAC), this expert body is to submit an interim report within 120 days of enactment and a final report within 270 days of enactment. The reports are to evaluate Amtrak's performance, business plan, cost-containment and productivity-improvement strategies, and cost and accounting procedures and recommend actions Amtrak can take to reduce Federal subsidies to achieve a complete or partial privatization.

BACKGROUND AND NEED FOR LEGISLATION

A February 1995 General Accounting Office report, entitled "Intercity Passenger Rail: Financial and Operating Conditions Threaten Amtrak's Long-Term Viability," found that:

> Amtrak's financial and operating conditions have declined steadily since 1990, and Amtrak's ability to provide nationwide service at the present level is now seriously threatened. * * * It is unlikely that Amtrak can overcome its problems in financing, capital investments, and service quality – and continue to operate the present nationwide system – without significant increases in passenger revenues and/or subsidies from Federal, State, and local governments.

The GAO report confirmed what many Amtrak passengers have known for a long time – that under-investment in Amtrak's equipment and facilities has begun to manifest itself in the form of declining service quality and reduced reliability. For example, the GAO found that the average age of Amtrak's cars was 22 years-about equal to what it was when Amtrak began operations with used private railroad equipment in 1971. The advanced age of the cars was exacerbated by a slowdown in equipment overhauls due to funding shortages in the late 1980s. In 1993, heavy overhauls were overdue for nearly 40 per cent of Amtrak's fleet. This capital investment deferral has a cascading effect: investments are not made due to a lack of funds, so service quality deteriorates and passengers find other means of travel leading to a further decline in revenues.

In response to this crisis at Amtrak, the Committee ordered reported H.R. 1788 on September 21, 1995 as a bipartisan compromise bill. H.R. 1788, which is virtually identical to H.R. 2247, was passed on the House floor on November 30, 1995, by a rollcall vote of 406-4. H.R. 1788 represented a thorough overhaul of Amtrak's corporate structure and labor requirements aimed at rescuing Amtrak from potential liquidation and preserving intercity passenger rail service in this country. However, Amtrak legislation was not enacted into law during the 104th Congress.

Since the autumn of 1995 when H.R. 1788 was passed by the House, Amtrak's financial situation has

grown even more precarious. The FY 1997 budget that was approved by the Amtrak Board of Directors allowed for a $66 million cash shortfall for the fiscal year, meaning that Amtrak has had to borrow funds on an unsecured line of credit simply to meet basic operating expenses such as payroll. In more recent estimates, this year-end cash shortfall has risen to about $80 million. In addition, Phyllis Scheinberg the GAO testified on March 12, 1997 at the hearing before the Subcommittee on Railroads that Amtrak's projected FY 1998 year-end cash shortfall is $148 million, whereas Amtrak currently has a short-term line of credit of $150 million, a mere $2 million higher than the company's estimated borrowing needs.

In addition to this potential near-term shortage in operating funds, Amtrak has substantial unmet capital needs. According to the General Accounting Office, about $2 billion is needed over the next 3 to 5 years to recapitalize the south end of the Northeast Corridor (Washington, DC to New York City) just to maintain existing service levels. In addition, another $1.4 billion is needed to complete upgrades on the north end of the corridor to introduce high-speed service between New York City and Boston. Furthermore, in part because of the significant debt load that Amtrak has incurred during the last several years, an increasingly small portion of Amtrak's federal capital grant is being dedicated to general capital needs. In FY 1997, only $12 million of the $223 million capital grant is expected to be available for general capital,

the rest being devoted to debt service, legal mandates and equipment overhauls.

In response to the financial crisis at Amtrak, the Committee appointed in April of this year a bipartisan panel of outside experts in various aspects of passenger transportation to recommend a plan to preserve and improve intercity rail passenger service in this country. The panel, known as the Working Group on Intercity Rail, consisted of 13 members with expertise in a wide range of areas, including corporate finance, labor relations, and marketing. Although working under a tight deadline of sixty days, the panel reached the unanimous conclusion that Amtrak is facing a severe financial crisis, with a bankruptcy possible within the next six to twelve months. The panel also produced a proposal that was endorsed by 11 out of the 13 members. The thrust of the proposal is that responsibility for ownership and management of infrastructure should be vested in a separate corporation, called Amrail in the report, allowing Amtrak to focus its energies on operating passenger rail service. The main objectives of the proposal are to provide for increased infrastructure investment, including on rail corridors outside the Northeast Corridor, and also to allow for multiple operators of passenger rail service, thereby introducing competition into the provision of intercity passenger rail.

The committee is extremely appreciative of the panel's efforts, especially in light of the fact that the members donated their time and energies with no

compensation other than the satisfaction of serving their country on a matter of critical public importance. Because of the complexities involved in redesigning passenger rail service according to the panel's recommendations, the Committee has determined that there is insufficient time at this point, given the urgency of the Amtrak crisis, to pursue legislation implementing these recommendations. Instead, H.R. 2247 authorizes the new, emergency reform board of directors that is established in the bill to evaluate the panel's proposal and to make recommendations to Congress. Subsequent legislation would be required in order for the panel's recommendations to be implemented.

Although Amtrak has made progress in reducing costs during the last several years, the Committee believes, based on the testimony provided both by Amtrak and the GAO, as well as the unanimous findings of the committee's Working Group on Intercity Rail, that a bankruptcy is a real possibility if significant reforms are not enacted. Additional federal subsidies alone simply cannot resolve the Amtrak crisis. The recently enacted Taxpayer Relief Act of 1997 (*P.L. 105-34*) provides for tax credits of up to $2.3 billion to be paid to Amtrak for capital expenses if reform legislation is enacted into law. As mentioned earlier, Amtrak has significant unmet capital needs, on the order of $5 billion to $6 billion, according to the GAO. So clearly the $2.3 billion provided for in the tax bill, while certainly beneficial to Amtrak, cannot be viewed as a way to remedy Amtrak's

financial ills; significant reforms that will allow Amtrak to operate more efficiently and compete effectively in the highly competitive intercity travel industry are essential. H.R. 2247 will go a long way toward accomplishing this goal.

* * *

Reforms to Amtrak's liability arrangements with the freight railroads are tied directly to Amtrak's financial situation. The current liability arrangement leaves the freight railroads, over whose tracks Amtrak operates by law, potentially exposed to the full cost of a passenger rail accident. This could significantly raise Amtrak costs if the freight railroads were able to recover the cost of that liability, including insurance – if available – that they might have to purchase to cover their liability exposure.

LIABILITY REFORM

The current liability arrangement between Amtrak and the freight railroads is tied to Amtrak's compulsory access to the freight railroads' rights-of-way. Outside the Northeast Corridor, Amtrak operates over the freight railroads' rights-of-way (except for two segments owned by Amtrak in upstate New York and in Michigan). Amtrak's access to freight railroad tracks and facilities is guaranteed by Federal law, so the freight railroads cannot refuse Amtrak access, but are entitled to compensation on an incremental cost basis. If Amtrak and the freight railroads cannot reach a voluntary agreement on the terms and conditions of

access, the STB sets the terms, including the level of compensation. Payments by Amtrak for use of the freight railroad facilities total between $90 million and $100 million annually.

Amtrak's access and payments to the freight railroads are governed by access agreements first signed in 1971 when Amtrak began operations. Virtually all the existing agreements contain a "no-fault" indemnity provision stating that, regardless of fault, the freight railroad will bear all property and injury losses to its own equipment and personnel, and Amtrak will do the same for its equipment and personnel, including passengers.

However, after the 1987 Chase, Maryland, accident involving the collision of an Amtrak train and a Conrail freight locomotive, the U.S. District Court for the District of Columbia ruled that enforcement of the indemnification agreement between Amtrak and Conrail would violate public policy since gross negligence on the part of the Conrail locomotive engineer was alleged as the cause of the accident. This avoided a large taxpayer-funded expense in the short term, but in the long run convinced the entire freight industry that the indemnity agreements offered no real legal protection.

The Committee notes that, since Amtrak is a publicly-funded operation, limitations on liability are justified as a way to protect the taxpayers from large damages awards. In addition, Amtrak's operating costs are higher, even in the absence of a major

damages award, due to the lack of liability limitations. Amtrak is already reserving nearly $200 million on its books to cover liability exposure (including employee claims under the Federal Employers? [sic] Liability Act, which are unaffected by H.R. 2247). With the threat of runaway jury verdicts, Amtrak's liability, litigation, and insurance costs are higher, thus imposing added costs on the taxpayers.

It should be noted that there is precedent for limitations on liability in domestic transportation due to the taxpayer-funded nature of the activity. A number of State laws and court decisions have served to limit liability in taxpayer-funded transportation, including in New York (the Long Island Railroad), Pennsylvania (Southeastern Pennsylvania Transportation Authority), New Jersey (New Jersey Transit) and Illinois (Chicago Transit). In addition, a 1990 Federal law limits the liability exposure of the Virginia Railway Express commuter authority. In general, the rationale for imposing limitations on liability in public transportation is to encourage certain activities that yield substantial social benefits that otherwise would not be undertaken due to the exposure to liability, and to protect the taxpayers who ultimately bear the costs of tort liability incurred in providing the public transportation.

In addition, limitations should apply to the freight railroads, over whose track Amtrak operates, in the event of a passenger accident, because Amtrak

has access to this track by virtue of a federal statute. In other words, the freight railroads did not invite Amtrak onto their tracks. In fact, they are not even fully reimbursed by Amtrak for its use of their track, again by virtue of a federal statute, which, in this case, requires Amtrak to compensate the freight railroads for the incremental costs only of its use of their tracks. In light of this fact, fairness dictates that some form of liability limitation apply to the freight railroads in the event of a passenger rail accident on their right-of-way.

The Committee rejects the contention that restrictions on liability will adversely impact rail safety. This allegation ignores the fact that there are significant incentives in place outside of tort liability for railroads to continue sound safety practices. Railroad safety is subject to regulation by the Federal Railroad Administration. Under current law, any single violation of a Federal safety law or regulation can subject an individual or a company to a fine from $500 to $10,000 – with the maximum increased to $20,000 for wilful violations. (There is a separate schedule for violations of the Hours of Service Act.) Total civil penalties collected by the Federal Railroad Administration in FY 1996 were $3.59 million.

In addition, in the wake of the 1987 Chase, Maryland, accident, in which the locomotive engineer who caused the accident was found to have been drug-impaired, Congress amended the Federal Railroad Safety Act to grant direct personal jurisdiction over railroad employees in safety-sensitive positions.

(Previously, only the rail carrier itself had been subject to Federal regulation, penalties, and discipline.) Also, mandatory random drug testing, alcohol testing, and pre-employment drug testing became standard features of the Federal railroad safety program. In addition, Federal rail safety laws were amended to require Federal certification of engineers, using mandatory training standards and procedures analogous to FAA standards for pilots. It should also be noted that the locomotive engineer involved in the Chase, Maryland, accident was convicted on criminal manslaughter charges and was sent to prison. In short, it is clear that adequate incentives remain in place to ensure the continued safe operation of the nation's rail system.

The Committee believes that a crucial feature of the liability reform provision is the affirmation of the right of owners of rights-of-way and passenger operators to indemnify by contract. Because of the court ruling in the wake of the Chase, Maryland, accident, existing contractual indemnity arrangements do not afford a reliable allocation of risk among the contracting parties. Without the confirmation that indemnity agreements will be upheld in court, future passenger operations, whether commuter, high-speed rail, or intercity rail, will be placed in jeopardy as freight railroads resist taking on what is increasingly viewed as an unacceptable and uncompensated liability exposure.

* * *

TITLE IV – USE OF RAILROAD FACILITIES

Section 401. Liability limitation

This section imposes limits on tort liability in the event of a rail passenger accident and confirms the right of rail passenger operators and owners of rights-of-way to contractually indemnify each other for liability arising out of rail passenger accidents.

Subsection (a) places the following caps in claims for personal injury, death or damage to property arising from rail passenger accidents: punitive damages limited to three times economic loss or $250,000, whichever is greater; noneconomic loss limited to $250,000 greater than economic loss. Limits apply on a per person, per accident basis. The subsection provides that, in any place where the law provides only for punitive damages for an event resulting in death, a claimant would be eligible to receive both noneconomic and economic damages, subject to the limits described above.

Subsection (a) also reaffirms the powers of passenger rail operators and entities providing facilities and infrastructure to enter into contractual indemnity arrangements to allocate the cost of liability incurred under the limits described above. These indemnification agreements are essential to facilitating passenger, commuter and excursion rail service, especially in light of the absence of an arm's length economic relationship between these carriers and the freight railroads whose facilities are required for their operation, since the indemnification agreements

are part of the contractual consideration. The uncertainty of enforcement of such agreements has become a major barrier to the expansion of commuter and passenger service and an outright obstacle to high-speed rail service since the decision in *National Railroad Passenger Corp. v. Consolidated Rail Corp.*, 698 F. Supp. 951 (D.D.C. 1988). The Committee believes that the public interest is best served by facilitating rail passenger service through legislation providing that once rail passenger transportation indemnification agreements are negotiated, they will be enforced. Accordingly, the Committee is overruling the National Railroad Passenger Corporation case in order to restore indemnitees' confidence in the enforceability of their indemnification agreements. No inference is to be drawn from the inclusion of this provision about the enforceability of any rail passenger transportation indemnification agreement for any obligation arising before the effective date of this provision.

* * *

CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

H.R. 2247 – Amtrak Reform and Privatization Act of 1997

* * *

Other impacts

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The bill contains a provision that would help assure the enforceability of certain contracts between

operators of rail passenger services – some of which are state and local governments – and owners of rights-of-way and other facilities. The need for this provision arises because of concern about liability in the case of an accident. This concern is the result of a court decision that required Conrail to pay substantial damages for a collision between an Amtrak train and a Conrail train, despite the existence of a contract limiting Conrail's liability. Without enactment of this provision, it is possible that owners of rail rights-of-way, such as Conrail, would press rail passenger operators, including state and local commuter rail authorities, for higher compensation to cover this increased risk when current operating agreements come up for renegotiation, CBO cannot estimate how much more commuter authorities might have to pay for the use of freight rail tracks in the absence of this legislation.

* * *

PART E – MISCELLANEOUS

CHAPTER 281 – LAW ENFORCEMENT

Sec.

28101. Rail police officers.
28102. Limit on certain accident or incident liability.
28103. Limitations on rail passenger transportation liability.

* * *

S 28103. Limitations on rail passenger transportation liability

(a) Limitations. – (1) Notwithstanding any other statutory or common law or public policy, or the nature of the conduct giving rise to damages or liability, in a claim for personal injury, death, or damage to property arising from or in connection with the provision of rail passenger transportation, or from or in connection with any rail passenger transportation operations over or rail passenger transportation use of right-of-way or facilities owned, leased, or maintained by any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State –

(A) punitive damages shall not exceed the greater of –

(i) $250,000; or

(ii) three times the amount of economic loss; and

(B) noneconomic damages awarded to any claimant for each accident or incident shall not exceed the claimant's economic loss, if any, by more than $250,000.

(2) If, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the claimant may recover in a claim limited by this subsection for economic and noneconomic damages and punitive damages, subject to paragraph (1)(A) and (B).

(3) For purposes of this subsection –

(A) the term "actual damages" means damages awarded to pay for economic loss;

(B) the term "claim" means a claim made, directly or indirectly –

(i) against Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State; or

(ii) against an officer, employee, affiliate engaged in railroad operations, or agent, of Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State;

(C) the term "economic loss" means any pecuniary loss resulting from harm, including the loss of earnings, medical expense loss, replacement services loss, loss due to death, burial costs, loss of business or employment opportunities, and any other form of pecuniary loss allowed under applicable State law or under paragraph (2) of this subsection;

(D) the term "noneconomic damages" means damages other than punitive damages or actual damages; and

(E) the term "punitive damages" means damages awarded against any person or entity to punish or deter such person or entity, or others, from engaging in similar behavior in the future.

(b) Indemnification Obligations. – Obligations of any party, however arising,

* * *

(i) Conditions of Guarantees. – (1) * * *

* * *

(4) The Secretary shall not require, as a condition for guarantee of an obligation under this section, that all preexisting secured obligations of an obligor be subordinated to the rights of the Secretary in the event of a default.

MINORITY VIEWS

The bill reported by the Committee generally does a good job of streamlining Amtrak's statutory mandate and freeing Amtrak to provide passenger service in a more businesslike fashion. In three instances, however, the bill makes unnecessary and unwarranted changes that would unfairly affect Amtrak, its employees, and its passengers.

First, the bill would eliminate entirely the wage protection for displaced or downgraded employees that has been provided to passenger rail employees since the 1930s. It is alleged that wage protection obligations impose an unwarranted cost on Amtrak that prevents it from being a financially solvent corporation. The data belie this assertion. According to Amtrak, it paid the following amounts in wage protection under Appendix C-2 to the National Railroad Passenger Corporation Agreement:

FY 1992: $903,000
FY 1993: 520,000
FY 1994: 975,000
FY 1995: 1,021,000
FY 1996: 1,059,000.

These payments were made at a time when Amtrak laid off nearly 2,000 employees, or about 8 percent of its labor force. In other words, the cost per year of laying off 2,000 employees was only about $1 million, or about $500 per employee. For a corporation with over $300 million in federal operating subsidies, we do not view this cost as a significant factor in Amtrak's ability to function as a business. Tom Downs, the President of Amtrak, agrees. He recently stated that "Amtrak does not experience significant costs in C2 [labor protection] expenses, so that the impact of the repeal of C2 would not save us any significant funds except in the ultimate bankruptcy of Amtrak.

We view this protection as a reasonable arrangement to protect employees, many of whom gave up their seniority on freight railroads to take jobs with the new passenger railroad created by the Congress. This protection would be particularly important if Amtrak were allowed to slip into bankruptcy and liquidation, leading to the elimination of over 20,000 jobs and of a critical element of the Nation's surface transportation system.

Moreover, the bill not only eliminates statutory wage protection, it also unilaterally abrogates language in collective bargaining agreements that provides

additional wage protection. These provisions represent wage protection that employees bargained for and that they sacrificed other benefits to get. We are strongly opposed to legislation which steps into the affairs of a private corporation and takes away benefits that were agreed upon between management and labor in freely conducted collective bargaining.

In sum, Title III of the bill, which both eliminates statutory wage protection and abrogates wage protection provisions in existing collective bargaining agreements, is unfair and unnecessary. We believe it should be dropped from the bill.

Second, the bill eliminates the remaining protection that Amtrak employees have against having their jobs contracted out to outside vendors. The statute already gives Amtrak considerable flexibility in this regard. Amtrak is free to contract out food and beverage service (though it has not been able to find an outside contractor that can provide this service more economically or effectively than Amtrak's own employees). Amtrak is also free to contract out any other work to the extent that is does not require laying off Amtrak's own employees. Amtrak has used this flexibility both to contract work out and as a bargaining chip with its employees to attain changes in work rules.

Amtrak has already laid off nearly 10 percent of its workforce in the last two years; we do not believe that it needs to contract out work and lay off more employees to become financially healthy. We do not

think that federal operating subsidies should be used to lay off employees. We therefore believe that the existing restrictions on contracting out are appropriate and provide Amtrak with all the flexibility it needs.

Third, the bill adversely affects Amtrak's passengers by limiting the damages that passengers can collect from freight railroads when a freight railroad causes an Amtrak accident. The bill also adversely affects Amtrak by legalizing agreements that force Amtrak to pay for the freight railroad's liability in an accident. The bill limits punitive damages to $250,000 or three times the economic loss (whichever is greater); it limits noneconomic damages (like pain and suffering) to the sum of economic losses plus $250,000; and it allows freight railroads to sign agreements with Amtrak to force Amtrak to pay for the freight railroad's liability in an accident, regardless of who grossly reckless or negligent the freight railroad was.

These provisions are neither fair nor sensible. Why should punitive damages, which are intended to punish the liable party for grossly negligent conduct, depend on economic losses? The economic losses have already been paid for by compensatory damages. Punitive damages should depend on the degree of recklessness of the conduct and the financial resources of the liable party, not on the economic damages suffered by the victim.

Why should noneconomic damages be dependent on economic damages? If a person is burned in an accident and suffers excruciating pain, is the pain any greater for a business executive who is also put out of work than for a 10-year-old child who has no economic losses?

What public policy objective is advanced by having freight railroads escape from their liability in causing accidents involving Amtrak? Why should freight railroads be liable for accidents when no other railroad is involved, but escape liability when Amtrak is involved, but did not cause the accident? The bill would exempt freight railroads from the consequences of their actions, regardless of how recklessly they behaved or how grossly they were negligent. We believe that safety will be adversely affected if freight railroads are protected from the consequences of their actions.

The bill as written establishes an irrational double standard for liability resulting from accidents. If a freight railroad's grade-crossing signal malfunctions, and a motorist is consequently injured at a grade crossing and rendered a quadriplegic, the motorist is not limited in what damages he or she can collect if the car is hit by a freight train. If the car is hit by an Amtrak train operating on the freight railroad's right-of-way, however, the motorist can collect only part of his damages, even though the damages are the same and the freight railroad is equally at fault in both cases. Moreover, the freight railroad is exempted entirely if an Amtrak train is

involved in the collision, even though it was the freight railroad that was responsible for maintaining the grade-crossing signal.

These three provisions of the bill make it impossible for us to support it. Moreover, these provisions were responsible for the failure of the Other Body to pass a similar bill in the 104th Congress, and for the opposition of the Administration to the current bill. If the three provisions continue to be included, the bill will not pass, and there will be no Amtrak reform. Conversely, if the three provisions are deleted, the bill should pass quickly. When this occurs, Amtrak will be able to collect the $1.2 billion made available by the recent budget agreement, contingent upon the passage of reform legislation. The combination of funding for capital investment and reform is critical to Amtrak's survival. It is better to correct these problems now so that the worthwhile provisions of the Amtrak bill can be enacted.

* * *

S. Rep. 105-85, 1997 U.S.C.C.A.N. 3055

AMTRAK AUTHORIZATION FOR APPROPRIATIONS

DATES OF CONSIDERATION AND PASSAGE
Senate: November 7, 13, 1997
House: November 13, 1997
Cong. Record Vol. 143 (1997)
Senate Report (Commerce, Science and Transportation Committee)
No. 105-85, September 24, 1997
(To accompany S. 738)

SENATE REPORT NO. 105-85
September 24, 1997

Mr. McCain, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 738]

The Committee on Commerce, Science, and Transportation, to which was referred the bill joint resolution (S. 738) "A Bill to reform the statutes relating to Amtrak, to authorize appropriations for Amtrak, and for other purposes", having considered the same, reports favorably thereon without with [sic] amendments and recommends that the bill joint resolution (as amended) do pass.

PURPOSE OF THE BILL

The bill, as reported, would authorize appropriations for Amtrak's general operating and capital expenditures for fiscal years (FY) 1998, 1999, 2000,

2001, and 2002. The bill directs Amtrak to operate within the funding levels authorized and to eliminate its need for federal operating support by the end of the five-year authorization period. In order to achieve operating self-sufficiency, the bill is designed to enable Amtrak to increase efficiencies, reduce costs, and operate as much like a private business as possible. Specifically, the bill provides for statutory reforms in the areas of Amtrak operations, procurement and labor, and permits changes to its liability.

The bill also would create an Amtrak Reform Council (the Council) responsible for evaluating Amtrak's performance and for making recommendations to Amtrak for further cost containment, productivity improvements, and financial reforms. The Council would submit an annual report to Congress which includes an assessment of Amtrak's progress on resolving productivity issues and recommendations for other improvements or any necessary legislative changes.

The bill further provides for a trigger mechanism to be carried forward if, starting two years after the date of enactment, the Council finds that Amtrak is not meeting its financial goals. The Council's assessment of Amtrak's failure at that point would trigger the development of two action plans. The Council would develop and submit to Congress one plan to provide for a restructured and rationalized national passenger rail system. Another plan would be developed by Amtrak to provide for its complete liquidation. If Congress does not take legislative action to

provide for a restructured passenger rail system within 90 days from receiving the Council's recommendations, Amtrak is required by the bill to implement the liquidation plan.

BACKGROUND AND NEEDS

Amtrak was created in 1971 by the Rail Passenger Service Act of 1970. The law established Amtrak in order to relieve the freight railroad industry from the economic burden of providing ongoing passenger service and to ensure that modern, efficient intercity passenger rail service would continue to be a part of the national transportation system. The freight railroads had lost approximately one billion dollars in trying to provide rail passenger service. With capital acquired from participating railroads and the federal government providing $40 million in direct grants and another $100 million in loan guarantees, Amtrak was to become self-sustaining within 2 years.

Since 1971, however, Amtrak has received more than $20 billion in Federal funding to help cover its operating and capital losses. Yet Amtrak has continued to struggle financially throughout its history despite these significant federal funding contributions. In fact, Amtrak's financial condition has now reached a crisis stage. Amtrak President Tom Downs testified this year before several House and Senate Committees that Amtrak could reach bankruptcy by the spring of 1998 if Amtrak is not provided the statutory reforms and funding requested. The General

Accounting Office (GAO) and other experts warn bankruptcy could occur even sooner.

In an attempt to address its financial problems, Amtrak began implementing a Strategic Business Plan in 1995. This restructuring plan, approved by the Amtrak Board of Directors in December 1994, was designed to increase revenues, reduce costs, and eliminate the need for federal operating assistance within 5 years. The restructuring divided passenger service operations into three units: a Northeast Corridor Business Unit responsible for operations on the East Coast between Virginia and Vermont; a West Coast Business Unit, referred to as Amtrak West, responsible for operations in California, Oregon, and Washington; and an Intercity Business Unit responsible for the remainder of the nation's intercity rail passenger service, including most of the long-distance, cross-country trains. The 1995 plan also included service reductions and eliminations, reductions in management staff, fare increases and other changes. Aside from restructuring, the plan assumed the creation of a dedicated source of revenue for capital and legislative relief from various statutory operating restrictions. The plan is periodically amended as necessary by the Board.

According to the GAO, despite initial financial improvements in early 1995, the gap between Amtrak's operating deficits and operating subsidies began to grow again in 1996 and that gap continues to widen today. Further, Amtrak's debt level has grown significantly over recent years as it turned to

private banks to finance equipment purchases and other investments not provided for by its federal grants. Amtrak is approximately $1 billion in debt and its debt load is projected to double to over $2 billion by 1999 to cover the money borrowed to finance high-speed train sets for the Northeast Corridor, their related maintenance facilities, and new locomotives. The GAO reports that Amtrak's debt levels could severely limit the use of federal operating support, shifting it from service operations to covering its private financial obligations.

The Committee is also concerned that Amtrak's federal capital grant has become increasingly constrained in recent years. For example, in FY 1997, only $12 million of the $223 million capital grant is expected to be available for general capital needs. The rest will be used for debt payments ($75 million), equipment overhauls ($110 million), and legally mandated work ($26 million). Further, even if the funding levels authorized in this bill are appropriated, a substantial cash shortfall is still projected by Amtrak in the amounts of $66 million (FY 1997); $118 million (FY 1998); $180 million (FY 1999); and $51 million (FY 2000). These shortfall projections do not account for Amtrak's current billion dollar debt level.

The Committee is very concerned that Amtrak's financial projections and long-term viability continue to remain heavily dependent on federal operating and capital funds. In addition, the Committee is concerned that Amtrak is staking the future of the

national system on the projected financial success of highspeed rail service in the Northeast Corridor. Amtrak's FY 1998 Legislative Report and Federal Grant Request estimates profits of $150 million annually from the planned high-speed rail service on the Northeast Corridor scheduled to begin in 1999. Amtrak reports these profits and other financial improvements will help offset costs on other money-losing parts of the system. Such revenue estimates, however, may be premature. The GAO estimates Amtrak still needs several billion dollars to bring its Northeast Corridor infrastructure up to a basic "state of good repair" and enable high-speed rail service to be implemented. The Committee will follow closely Amtrak's success in meeting its financial targets and will be particularly interested in whether Amtrak is able to meet its service initiation time line and revenue goals set for its high-speed rail operations.

LEGISLATIVE HISTORY

Amtrak's previous authorization expired in fiscal year 1994. The Senate Commerce Committee held three hearings addressing Amtrak during the 104th Congress and reported out a comprehensive reform and reauthorization bill (S. 1318) on July 20, 1995. However, an agreement could not be reached to allow that legislation to be considered by the full Senate.

The Subcommittee on Surface Transportation and Merchant Marine held a hearing on Amtrak's financial situation on March 13, 1997. The Committee received

testimony from Amtrak, the Federal Railroad Administration, and the General Accounting Office about Amtrak's financial challenges, its restructuring activities to date, and its ability in meeting the Strategic and Business Plan which Amtrak began implementing in 1995. The Committee also heard about proposals from the Administration and Amtrak to secure Amtrak's future, including financial and statutory reforms, and Amtrak's desire for the establishment of a dedicated source of capital funding.

Based in part on the testimony provided during the March hearing, Senator Hutchison introduced S. 738 on May 14, 1997. The bill, cosponsored by Senators Snowe, Roth, Roberts, Hutchison, and Chafee, would reauthorize Amtrak for five years and provide the statutory reforms and funding levels requested by Amtrak to allow it to operate more like a business.

On June 26, 1997, the Commerce Committee in open executive session ordered S. 738 reported, by a rollcall vote of 14-4, with amendments.

SUMMARY OF MAJOR PROVISIONS

Specifically, the bill as reported includes the following major provisions:

1. Operational Reforms. Amtrak would be directed to strive to operate as a national rail passenger system which provides access to all areas of the country and ties together existing and emerging corridors. The prohibition against other companies

from operating intercity passenger service over an Amtrak route unless Amtrak gives consent would be repealed. Amtrak's required notification period regarding any proposed discontinuances of a route would be extended from 90 days to 180 days in order to give states adequate time to share or assume the cost of retaining a route targeted for discontinuance. Amtrak would be allowed to contract for intercity bus service when passengers will move by rail immediately before or after bus travel. Amtrak and intercity bus operators would be encouraged to enter into intermodal arrangements that would increase operating efficiencies and travel convenience, allowing the coordination of schedules, routes, rates, and facilities.

2. Contracting Out. Amtrak is prohibited under current law from contracting out any work, other than for food and beverage services, if such action would result in the loss of even one job. As requested by Amtrak, this bill would repeal that prohibition effective 180 days after enactment and provide for an accelerated bargaining schedule to allow labor and management to resolve contracting out issues through a non-binding arbitration process prior to the ban's repeal.

The Committee strongly believes the repeal of the legal ban on contracting out is very necessary to help Amtrak operate more effectively and efficiently. Unnecessary statutory burdens must be lifted if Congress is serious about addressing Amtrak's financial crisis and preserving intercity passenger rail service in the United States. The Committee is unaware of any

similar statutory prohibitions covering private or public entities. The Committee believes retaining the statutory impediments would doom Amtrak's efforts to achieve long-term viability and to reduce its reliance on Federal assistance. The Administration also noted this necessity in its Amtrak reauthorization proposal submission of the 104th Congress which included provisions allowing Amtrak management and labor to negotiate agreements permitting greater flexibility in contracting out work.

3. Labor Reforms. Current law mandates employee protective arrangements which provide up to six years of severance pay to Amtrak rail workers affected by route discontinuances. The Committee bill repeals this statutory requirement as requested by Amtrak and supported by the Administration during the 104th Congress. The Committee bill replaces the mandatory six year severance pay with a requirement that Amtrak negotiate severance pay issues with its rail workers. The bill requires accelerated bargaining procedures within a 180-day time frame.

4. Liability Reforms. Amtrak has testified four times before the Senate Commerce Committee during the 104th and 105th Congress to report on its plans to improve its financial performance and achieve long-term viability. Amtrak's testimony has consistently discussed the need for statutorily imposed liability limits in order for Amtrak to achieve operating self-sufficiency. S. 738 would permit Amtrak to enter into "contracts" with its passengers through ticket purchases to limit claims related to rail passenger

transportation to no less than the limits established by the Committee-passed product liability reform legislation (i.e., punitive damages, where permitted, equal to 2 times compensatory damages or $250,000 whichever is greater). Further, this bill clarifies that indemnification agreements related to the provision of rail passenger service entered into by Amtrak and other parties would be enforceable. The Committee has been requested by Amtrak to include this provision in order to aid Amtrak in achieving operating self-sufficiency. Amtrak and the freight railroads believe legislation is necessary to confirm enforceability of the indemnification agreements they have entered into regarding operation over each others' rail lines, notwithstanding allegations of gross negligence by a freight railroad or Amtrak. As long as there is the possibility that state laws governing indemnification contracts may make these contracts unenforceable, Amtrak and a freight railroad may find themselves litigating with each other. Amtrak believes that such litigation inevitably would not only adversely impact business relationships between Amtrak and the host freight railroads, but it would also lead to significantly higher outlays in settlements and judgments to plaintiffs.

5. Independent Assessment. While Amtrak's financial plan is currently reviewed annually by its Board, questions remain on the accuracy of Amtrak's accounting methodology. The bill would require an independent assessment of Amtrak's financial requirements through FY 2002, similar to the audit

required in the Federal Aviation Reauthorization Act of 1996. The Inspector General of the Department of Transportation would be directed to oversee the independent assessment to be completed within 180 days after enactment of this bill. The Committee expects the audit to cover Amtrak's cost allocation process and procedures, expenses related to intercity service, commuter service and any other service provided by Amtrak; Amtrak's Strategic Business Plan, including projected expenses, capital needs, ridership and revenue forecasts; and, Amtrak's debt obligations.

In addition, the Committee believes an independent analysis of Amtrak's investment in the Northeast Corridor is warranted. The Committee has heard numerous concerns raised over Amtrak's financial commitment to the Corridor and how that targeted investment has restricted funding for the rest of the system. Therefore, the Committee believes a comparison between Northeast Corridor investment to date, the investment projections assumed in Amtrak's Business Plan, and the rest of the system is necessary. Finally, given that some have advocated privatizing Amtrak, including the Working Group on Intercity Passenger Rail established by the House Committee on Transportation and Infrastructure, the Committee believes an independent review of financial and other asset-related data concerning the value of the Northeast Corridor is warranted.

6. Amtrak Reform Council. The bill would establish a 9-member Amtrak Reform Council to

monitor Amtrak's progress in meeting its financial goals. The Council would be directed to evaluate Amtrak's performance and make recommendations to Amtrak for further cost containment, productivity improvements, and financial reforms. The Council would submit an annual report to Congress which includes an assessment of Amtrak's progress on resolving productivity issues and recommendations for other improvements or any necessary legislative changes. The Committee expects Amtrak to give the Council's recommendations careful consideration.

7. Sunset Trigger. The bill establishes a mechanism to be implemented if at any time following two years after the date of enactment, the Council finds that Amtrak is not meeting its financial goals. In the event such a finding is made by the Council, it would be directed to develop and submit within 90 days to Congress an action plan for a restructured and rationalized intercity rail passenger system. Within that same time period, Amtrak would be directed to prepare a plan for its complete liquidation. The liquidation plan would be reviewed by the GAO and the Inspector General of the Department of Transportation for accuracy and reasonableness in order to ensure to the greatest extent practicable that the government's significant investment in Amtrak is protected. If the Congress does not approve legislation to provide for a restructured passenger rail system within 90 days after receiving the Council's recommendations, Amtrak would be required to

implement the liquidation plan, taking into account the comments of the GAO and the Inspector General.

The Committee wants to clarify that if the Council makes a determination that Amtrak is failing, the bill does not require the Council's proposed restructuring plan to be approved without the opportunity to amend or change the plan. In fact, the Committee fully expects consideration of alternative approaches for addressing the future of the nation's passenger rail system. Further, the Committee is aware that any plan providing for a restructured intercity rail passenger service would need to take into account the contractual relationships between the freight railroads and Amtrak. This bill has no direct effect on existing law as it pertains to access to the tracks of freight railroads by entities other than Amtrak. Therefore, should restructuring legislation be implemented in the future, this issue would need to be fully addressed.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,

Congressional Budget Office,

Washington, DC, July 22, 1997.

Hon. John McCain,
Chairman, Committee on Commerce,
Science and Transportation,
Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for S. 738, the Amtrak Reform and Accountability Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Clare Doherty (for federal costs), Karen McVey (for the state and local impact), and Jean Wooster (for the private-sector impact).

Sincerely,
June E. O'Neill, Director.
Enclosure.

* * *

Other Impacts – S. 738 contains a number of other provisions that, while not mandates, could affect the budgets of state and local governments. CBO estimates that, on the whole, these provisions would benefit state and local governments.

The bill contains a provision that would help assure the enforceability of certain contracts between operators of rail passenger services – some of which are state and local governments – and owners of rights-of-way and other facilities. The need for this provision arises because of concern about liability in the case of an accident. This concern is the result of a

court decision that required Conrail to pay substantial damages for a collision between an Amtrak train and a Conrail train, despite the existence of a contract limiting Conrail's liability. Without enactment of this provision, it is possible that owners of rail rights-of-way, such as Conrail, would press rail passenger operators, including state and local commuter rail authorities, for higher compensation to cover this increased risk when current operating agreements come up for renegotiation. CBO cannot estimate how much more commuter authorities might have to pay for the use of freight rail tracks in the absence of this legislation.

* * *

SECTION-BY-SECTION ANALYSIS

Section 1. Short title; table of sections

This section states the short title of the bill, the Amtrak Reform and Accountability Act of 1997, and contains a table of sections for the bill.

Section 2. Findings

This section includes 11 findings relating to the role of intercity rail passenger service in the overall national transportation system; the urgent need for immediate action to improve Amtrak's financial condition and eliminate its dependency on federal operating assistance; the necessity of all of Amtrak's stakeholders to participate in efforts to reduce Amtrak's costs and increase its revenues; the importance

of improving Amtrak's service quality and the sound investment of federal and state resources; the importance of implementing new operating strategies without compromising transportation safety; the need for Amtrak and its employees to modify collective bargaining agreements to make more efficient use of manpower; the need for Amtrak to work cooperatively with intercity bus service providers to produce efficient transportation service; and the recommendation that a dedicated source of capital funding be established for Amtrak to ensure that Amtrak will be able to fulfill the goals of maintaining a national rail passenger system without Federal operating assistance.

TITLE I – REFORMS

SUBTITLE A – OPERATIONAL REFORMS

* * *

Section 142. Service discontinuance

This section rescinds contracts entered into before the date of the enactment of this bill between Amtrak and labor organizations representing Amtrak employees relating to employee protective arrangements and severance benefits applicable to Amtrak employees. This section also repeals Appendix C-2 to the National Railroad Passenger Corporation Agreement that was signed in 1973. The 1973 agreement requires Amtrak to pay up to six years of pay for any employee laid off because of a service discontinuance.

This section would take effect 180 days after the date of enactment.

SUBTITLE D – USE OF RAILROAD FACILITIES

Section 161. Liability limitation

Subsection (a) of section 161 permits Amtrak to limit its exposure to punitive damages, where permitted, if passengers are provided adequate notice of such contractual limitations. The section authorizes Amtrak to establish contracts with its passengers to limit claims relating to rail passenger transportation to no less than the limits established in product liability reform legislation reported by the Committee earlier this session (i.e. punitive damages, where permitted, equal to 2 times compensatory damages or $250,000, whichever is greater). Subsection (a) has no impact on economic damage claims, which include lost wages, medical expenses and other out-of-pocket costs. Subsection (a) also has no impact on non-economic compensatory damage claims.

Subsection (b) of section 161 clarifies that rail passenger service indemnification agreements entered into by Amtrak and other parties are enforceable. Amtrak and the freight railroads believe legislation is necessary to confirm the enforceability of indemnification agreements. The indemnification agreements allocate the cost of liability among the agreement parties. As long as there is the possibility that state laws can nullify the indemnification contracts, Amtrak and a freight railroad could find

themselves litigating against each other or concerning their obligations to injured third parties. Amtrak believes that such litigation inevitably would not only adversely impact its business relationship with its host freight railroads, but it would also lead to significantly higher outlays in settlements and judgments to litigants.

Section 162. Retention of facilities

This section updates an existing provision that prevents railroads from disposing of facilities of use to Amtrak without the prior agreement of the Secretary of Transportation.

* * *

CHAPTER 281 – LAW ENFORCEMENT

S 28103. Limitations on rail passenger transportation liability

(a) In General. – Notwithstanding any other statutory or common law or public policy, or the nature of the conduct giving rise to damages or liability, a contract between Amtrak and its passengers, or private railroad car operators and their passengers regarding claims for personal injury, death, or damage to property arising from or in connection with the provision of rail passenger transportation, or from or in connection with any operations over or use of right-of-way or facilities owned, leased, or maintained by Amtrak, or from or in connection with any rail passenger transportation operations

over or rail passenger transportation use of right-of-way or facilities owned, leased, or maintained by any high-speed railroad authority or operator, any commuter authority or operator, or any rail carrier shall be enforceable if –

(1) punitive or exemplary damages, where permitted, are not limited to less than 2 times compensatory damages awarded to any claimant by any State or Federal court or administrative agency, or in any arbitration proceeding, or in any other forum or $250,000, whichever is greater;

(2) passengers are provided adequate notice of any such contractual limitation or waiver or choice of forum; and

(3) passengers are given an opportunity to purchase supplemental insurance coverage when a ticket is purchased or at point of departure.

(b) Claim Defined. – For purposes of this section, the term "claim" means a claim made directly or indirectly –

(1) against Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, or any rail carrier or private rail car operators; or

(2) against an affiliate engaged in railroad operations, officer, employee, or agent of, Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, or any rail carrier.

(c) Special Rule. – Notwithstanding subsection (a)(1), if, in any case in which death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, a claimant may recover in a claim limited by this section for actual or compensatory damages measured by the pecuniary injuries, resulting from such death, to the persons for whose benefit the action was brought, subject to the provisions of subsection (a).

FN1 Changes in existing law are shown as that law is reflected in the United States Code, whether or not the title of the Code in which the law is reflected has been enacted into positive law.

143 Cong.Rec. H10894-01

Congressional Record – House of Representatives
Proceedings and Debates of the 105th Congress,
First Session
Thursday, November 13, 1997

4:30 p.m.

[H10894] AMTRAK REFORM AND ACCOUNTABILITY ACT OF 1997

Mr. SHUSTER.

Mr. Speaker, I move to suspend the rules and pass the Senate bill (S. 738) to reform the statutes relating to Amtrak, to authorize appropriations for Amtrak, and for other purposes, as amended.

The Clerk read as follows:

S. 738

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; AMENDMENT OF TITLE 49; TABLE OF SECTIONS.

(a) SHORT TITLE. – This Act may be cited as the "Amtrak Reform and Accountability Act of 1997".

(b) AMENDMENT OF TITLE 49, UNITED STATES CODE. – Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or a

repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 49, United States Code.

(c) TABLE OF SECTIONS. – The table of sections for this Act is as follows:

Sec. 1. Short title; amendment of title 49; table of sections.

Sec. 2. Findings.

TITLE I – REFORMS

SUBTITLE A – OPERATIONAL REFORMS

Sec. 101. Basic system.

Sec. 102. Mail, express, and auto-ferry transportation.

Sec. 103. Route and service criteria.

Sec. 104. Additional qualifying routes.

Sec. 105. Transportation requested by States, authorities, and other persons.

Sec. 106. Amtrak commuter.

Sec. 107. Through service in conjunction with intercity bus operations.

Sec. 108. Rail and motor carrier passenger service.

Sec. 109. Passenger choice.

Sec. 110. Application of certain laws.

SUBTITLE B – PROCUREMENT

Sec. 121. Contracting out.

SUBTITLE C-EMPLOYEE PROTECTION REFORMS

Sec. 141. Railway Labor Act Procedures.

Sec. 142. Service discontinuance.

SUBTITLE D – USE OF RAILROAD FACILITIES

Sec. 161. Liability limitation.

Sec. 162. Retention of facilities.

TITLE II – FISCAL ACCOUNTABILITY

Sec. 201. Amtrak financial goals.

Sec. 202. Independent assessment.

Sec. 203. Amtrak Reform Council.

Sec. 204. Sunset trigger.

Sec. 205. Senate procedure for consideration of restructuring and liquidation plans.

Sec. 206. Access to records and accounts.

Sec. 207. Officers' pay.

* * *

SEC. 2. FINDINGS.

The Congress finds that –

(1) intercity rail passenger service is an essential component of a national intermodal passenger transportation system;

(2) Amtrak is facing a financial crisis, with growing and substantial debt obligations severely limiting its ability to cover operating costs and jeopardizing its long-term viability;

(3) immediate action is required to improve Amtrak's financial condition if Amtrak is to survive;

(4) all of Amtrak's stakeholders, including labor, management, and the Federal government, must participate in efforts to reduce Amtrak's costs and increase its revenues;

(5) additional flexibility is needed to allow Amtrak to operate in a businesslike manner in order to manage costs and maximize revenues;

(6) Amtrak should ensure that new management flexibility produces cost savings without compromising safety;

(7) Amtrak's management should be held accountable to ensure that all investment by the Federal Government and State governments is used effectively to improve the quality of service and the long-term financial health of Amtrak;

(8) Amtrak and its employees should proceed quickly with proposals to modify collective bargaining agreements to make more efficient use of manpower and to realize cost savings which are necessary to reduce Federal financial assistance;

(9) Amtrak and intercity bus service providers should work cooperatively and develop coordinated intermodal relationships promoting seamless transportation services which enhance travel options and increase operating efficiencies;

(10) Amtrak's Strategic Business Plan calls for the establishment of a dedicated source of capital funding for Amtrak in order to ensure that Amtrak will be able to fulfill the goals of maintaining –

(A) a national passenger rail system; and

(B) that system without Federal operating assistance; and

(11) Federal financial assistance to cover operating losses incurred by Amtrak should be eliminated by the year 2002.

SEC. 414. AMTRAK TO NOTIFY CONGRESS OF LOBBYING RELATIONSHIPS.

If, at any time, during a fiscal year in which Amtrak receives Federal assistance, Amtrak enters into a consulting contract or similar arrangement, or a contract for lobbying, with a lobbying firm, an individual who is a lobbyist, or who is affiliated with

a lobbying firm, as those terms are defined in section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602), Amtrak shall notify the United States Senate Committee on Commerce, Science, and Transportation, and the United States House of Representatives Committee on Transportation and Infrastructure of –

(1) the name of the individual or firm involved;

(2) the purpose of the contract or arrangement; and

(3) the amount and nature of Amtrak's financial obligation under the contract.

This section applies only to contracts, renewals or extensions of contracts, or arrangements entered into after the date of the enactment of this Act.

SEC. 415. FINANCIAL POWERS.

(a) CAPITALIZATION. – (1) Section 24304 is amended to read as follows:

"s24304. Employee stock ownership plans

"In issuing stock pursuant to applicable corporate law, Amtrak is encouraged to include employee stock ownership plans.".

(2) The item relating to section 24304 in the table of sections of chapter 243 is amended to read as follows:

"24304. Employee stock ownership plans.".

(b) REDEMPTION OF COMMON STOCK. – Amtrak shall, before October 1, 2002, redeem all common stock previously issued, for the fair market value of such stock.

(c) ELIMINATION OF LIQUIDATION PREFERENCE AND VOTING RIGHTS OF PREFERRED STOCK. – (1)(A) Preferred stock of Amtrak held by the Secretary of Transportation shall confer no liquidation preference.

(B) Subparagraph (A) shall take effect 90 days after the date of the enactment of this Act.

(2)(A) Preferred stock of Amtrak held by the Secretary of Transportation shall confer no voting rights.

(B) Subparagraph (A) shall take effect 60 days after the date of the enactment of this Act.

(d) STATUS AND APPLICABLE LAWS. – (1) Section 24301(a)(3) is amended by inserting ", and shall not be subject to title 31" after "United States Government".

(2) *Section 9101(2) of title 31, United States Code*, relating to Government corporations, is amended by striking subparagraph (A) and redesignating subparagraphs (B) through (L) as subparagraphs (A) through (K), respectively.

The SPEAKER pro tempore.

Pursuant to the rule, the gentleman from Pennsylvania <Mr. SHUSTER> and the gentleman from

Minnesota <Mr. OBERSTAR> each will control 20 minutes.

The Chair recognizes the gentleman from Pennsylvania <Mr. SHUSTER>.

Mr. SHUSTER.

Mr. Speaker, I yield myself such time as I may consume. [H10900]

Mr. Speaker, at long last we have an Amtrak reform bill here on the floor which has strong bipartisan support. It is a bill which has the reforms in it which are so necessary. It is a bill which provides for the board, which is the creation of a new board which is constitutional and which has the degree of independence necessary to make the tough decisions. It provides for the management to be able to make decisions with regard to the route configuration. Indeed, it gives Amtrak a fighting chance to succeed and survive.

Mr. Speaker, I urge all of our colleagues to support this measure.

Mr. Speaker, I move to suspend the rules and pass the bill, S. 738, as amended.

Mr. Speaker, I rise in support of S. 738, the Amtrak Reform and Accountability Act of 1997.

Mr. Speaker, I am very pleased that we have been able to reach a bipartisan agreement on an amendment to S. 738. Over the past 24 hours, we have been able to reach consensus with our

colleagues on the other side of the aisle on the issue of the Amtrak board of directors. This amendment will provide Amtrak with the reforms it so badly needs, as well as release of the $2.3 billion in capital funds that were provided in the Taxpayer Relief Act.

The amendment adopts the basic principles and reforms of S. 738, the bill passed by the Senate last Friday by unanimous consent, and makes limited but important changes that will ensure successful implementation of long overdue Amtrak reforms.

This amendment contains the labor, liability, and contracting-out provisions that were included in the Senate bill with no changes.

I am pleased that the reforms in this amendment will allow Amtrak, for the first time in its 26-year History, to operate more like a business and cut costs.

On the issue of labor protection, the Senate bill contains a provision that is almost identical to reforms that were included in the House bill, H.R. 2247. The provision will repeal the statutory guarantee that Amtrak provide up to 6 years of labor protection to any employee who is laid off due to a route elimination or frequency reduction to below three times per week. This issue would be sent to collective bargaining, under a 180-day accelerated bargaining process.

The current ban on contracting out any work other than food and beverage service if it would result in the layoff of a single employee would also be

repealed in the Senate bill. This issue would be sent to collective bargaining, but would not be negotiable until the next round of contract negotiations, unless the parties mutually agreed to take it up before then.

The Senate bill also provides for a global cap of $200 million on tort liability for death or injury to a passenger, or damage to property of a passenger. It also includes a requirement that Amtrak maintain insurance of at least $200 million.

Again, on these important issues . . . labor protection, liability and contracting out . . . we are accepting the Senate compromise and making no change to it.

The one significant departure from the Senate bill in this amendment relates to the board of directors. The House amendment would replace the existing board with a new, 7-member reform board to be appointed by the President in consultation with House and Senate majority and minority leadership. New members would be required to have expertise in transportation or corporate or financial management.

The purpose of this provision is to provide a fresh start for Amtrak, and to ensure that only qualified professionals are permitted to serve on the board of directors. The amendment also allows the President to select the Secretary of Transportation as a board member. It also designates the president of Amtrak as an ex-officio, non-voting member of the board.

Mr. Speaker, these changes to Amtrak's board bill are necessary to allow the Senate-passed reforms to work.

Mr. Speaker, I believe that the Senate bill as modified by this amendment provides meaningful reform of Amtrak that will go a long way toward restoring financial viability and improving rail passenger service. It will also release the $2.3 billion that was provided in the Taxpayer Relief Act, allowing Amtrak to make much-needed capital investments.

I urge a "yes" vote on S. 738, as amended.

Mr. Speaker, I reserve the balance of my time.

Mr. OBERSTAR.

Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, the bill before us represents a compromise on Amtrak which I urge my colleagues on this side of the aisle to support, and which I say they can comfortably support. It is a compromise in which both sides have satisfied their most important objectives. While we have held divergent views on various aspects of this issue, we have had a common goal, that is, to ensure the survival of Amtrak. If we do not pass reform legislation before the end of the session, Amtrak's future will be in doubt.

Passage of this reform legislation is necessary for Amtrak to gain access to $2.3 billion for capital improvements made available by the tax reform bill.

Equally important, in December Amtrak must go to its bankers for renewal of a line of credit which it needs to meet its daily operating expenses. If the bankers should learn that the $2.3 billion capital funding is still in doubt, they may be unwilling to renew the line of credit.

Our common goal of ensuring the survival of Amtrak could have been achieved earlier. We had differences. We have worked out those differences.

Our Republican colleagues on the committee wanted changes in the constitution of the board of Amtrak directors. We have accommodated those changes. We have worked them out. We reached agreement on a process for reforming the board of directors. Under this process, the directors will be appointed in a manner which is fair to the men and women of the Amtrak work force and which is fair to the American public which owns Amtrak through the Department of Transportation.

The manner of selecting the board preserves the constitutional authority of the President and of the Congress. In addition, we have developed a selection process that ensures that there will be an orderly transition; specifically, that the old board will not be terminated until the new board is ready to assume its responsibilities. The compromise also assures that the Secretary of Transportation who represents the public as owner of Amtrak may, I emphasize may, continue to serve on the board, and that the president

of Amtrak will continue to participate in the board process, but not as a voting member.

Mr. Speaker, I want to emphasize that accepting this compromise does not mean that on my part I am dissatisfied in any way with the existing board. In my opinion, they have done an outstanding job of guiding Amtrak to make the best possible business decisions with limited resources available. I especially commend the board for their negotiations with the BMWE which produced an agreement which is fair to workers and protects Amtracks financial interests.

The bill does not prohibit the President from reappointing any member of the existing board to the new board. That possibility remains open. In fact, I believe

* * *

1997 WL 744778 (White House)

The White House
Office of Communications

[1] AMTRAK REFORM AND ACCOUNTABILITY ACT 12/02/97
Wednesday, December 3, 1997

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release December 2, 1997

STATEMENT BY THE PRESIDENT

Today I am pleased to sign into law S. 738, the "Amtrak Reform and Accountability Act of 1997." This Act represents the first Amtrak reauthorization since 1992 and the most comprehensive restructuring of Amtrak since the early 1980s. Amtrak is a significant component of our national transportation services in densely populated corridors, such as the northeast; on medium- and short-haul routes; and on trans-continental routes linking cities across the Nation. In many areas of rural America it is the only alternative to the automobile. With the enactment of this legislation, we have the opportunity to set Amtrak on a course to continue these services into the 21st Century.

Amtrak has entered a critical stage in its existence. Over the past several years, Amtrak has restructured its operations and streamlined its approach to inter-city rail passenger service. It has improved its organization and created separate strategic business units that are better able to respond to

customer needs. It has also significantly reduced its need for Federal operating subsidies. Today, Amtrak recovers a higher percentage of its operating costs from fares – 85.1 percent – than any other passenger or commuter railroad in America, and higher than the rail systems in France and Germany. This Act will allow Amtrak to build upon this progress.

With this Act, Amtrak will now be able to access the $2.3 billion capital account created in the Taxpayer Relief Act of 1997. With these funds, Amtrak will be able to make many needed capital improvements, including replacing its aging car fleet, upgrading its tracks, and rehabilitating stations and maintenance facilities nationwide. With these improvements in place, Amtrak will be able to attract new customers and better serve existing customers. The implementation of new high-speed operations in the northeast corridor between Boston and Washington is a key part of this greatly improved service.

This Act will also free Amtrak to operate in a more businesslike manner by repealing a number of outdated requirements that hampered its ability to operate more like a private entrepreneurial corporation. In particular, S. 738 frees Amtrak to adjust its route structure to meet demand and to respond to competition rather than to congressional directive.

The Act also addresses certain labor relations issues by directing that these issues be negotiated by Amtrak and its unions through collective bargaining, rather than by statute. In this respect, it carries

forward the spirit of the reform-oriented labor agreement recently agreed to by Amtrak and one of its unions.

This Act calls for the creation of an Amtrak Reform Council that will bring together individuals with expertise in the fields of corporate management, finance, rail and other transportation operations, labor, economics, and law to assist Amtrak in identifying how to operate more efficiently and effectively.

As a result of these changes, we can all look forward to better rail service. I recognize that this Act represents a compromise of a number of competing concerns and competing visions for Amtrak and its future. I want to compliment the Senators and Representatives who devoted many hours to developing this needed legislation. I also want to commend the many individuals in the Department of Transportation and other Federal agencies who contributed to the development of this Act.

WILLIAM J. CLINTON
THE WHITE HOUSE,
December 2, 1997

1997 WL 744778 (White House)

143 Cong.Rec. H10962-03

Congressional Record – House of Representatives
Proceedings and Debates of the 105th Congress,
First Session
Monday, December 15, 1997

OMISSION FROM THE
CONGRESSIONAL RECORD OF
NOVEMBER 13, 1997,
PAGES 10899 AND 10900

The SPEAKER pro tempore.

Pursuant to the rule, the gentleman from Pennsylvania <Mr. SHUSTER> and the gentleman from Minnesota <Mr. OBERSTAR> each will control 20 minutes.

The Chair recognizes the gentleman from Pennsylvania <Mr. SHUSTER>.

Mr. SHUSTER.

Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, at long last we have an Amtrak reform bill here on the floor which has strong bipartisan support. It is a bill which has the reforms in it which are so necessary. It is a bill which provides for the board, which is the creation of a new board which is constitutional and which has the degree of independence necessary to make the tough decisions. It provides for the management to be able to make decisions with regard to the route configuration.

Indeed, it gives Amtrak a fighting chance to succeed and survive.

Mr. Speaker, I urge all of our colleagues to support this measure.

Mr. Speaker, I rise in support of S. 738, the Amtrak Reform and Accountability Act of 1997.

Mr. Speaker, I am very pleased that we have been able to reach a bipartisan agreement on an amendment to S. 738. Over the past 24 hours, we have been able to reach consensus with our colleagues on the other side of the aisle on the issue of the Amtrak board of directors. This amendment will provide Amtrak with the reforms it so badly needs, as well as release of the $2.3 billion in capital funds that were provided in the Taxpayer Relief Act.

The amendment adopts the basic principles and reforms of S. 738, the bill passed by the Senate last Friday by unanimous consent, and makes limited but important changes that will ensure successful implementation of long overdue Amtrak reforms.

This amendment contains the labor, liability, and contracting-out provisions that were included in the Senate bill with no changes.

I am pleased that the reforms in this amendment will allow Amtrak, for the first time in its 26-year history, to operate more like a business and cut costs.

On the issue of labor protection, the Senate bill contains a provision that is almost identical to

reforms that were included in the House bill, H.R. 2247. The provision will repeal the statutory guarantee that Amtrak provide up to 6 years of labor protection to any employee who is laid off due to a route elimination or frequency reduction to below three times per week. This issue would be sent to collective bargaining, under a 180-day accelerated bargaining process.

The current ban on contracting out any work other than food and beverage service if it would result in the layoff of a single employee would also be repealed in the Senate bill. This issue would be sent to collective bargaining, but would not be negotiable until the next round of contract negotiations, unless the parties mutually agreed to take it up before then.

The Senate bill also provides for a global cap of $200 million on tort liability for death or injury to a passenger, or damage to property of a passenger. It also includes a requirement that Amtrak maintain insurance of at least $200 million.

Further, the Senate bill would clarify that a provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims. This provision is not to be construed to impair or call into question the enforceability of existing contracts between Amtrak and other rail carriers that allocate financial responsibility for claims. It also should not be construed to affect pending cases. In addition, it should not be construed to eliminate

existing State limits on liability for commuter operators.

Again, on these important issues . . . labor protection, liability and contracting out . . . we are accepting the Senate compromise and making no change to it.

The one significant departure from the Senate bill in this amendment relates to the board of directors. The House amendment would replace the existing board with a new, 7-member reform board to be appointed by the President in consultation with House and Senate majority and minority leadership. New members would be required to have expertise in transportation or corporate or financial management.

The purpose of this provision is to provide a fresh start for Amtrak, and to ensure that only qualified professionals are permitted to serve on the board of directors. The amendment also allows the President to select the Secretary of Transportation as a board member. It also designates the president of Amtrak as an ex-officio, non-voting member of the board.

Mr. Speaker, these changes to Amtrak's board bill are necessary to allow the Senate-passed reforms to work.

Mr. Speaker, I believe that the Senate bill as modified by this amendment provides meaningful reform of Amtrak that will go a long way toward restoring financial viability and improving rail passenger service. It will also release the $2.3 billion that

was provided in the Taxpayer Relief Act, allowing Amtrak to make much-needed capital investments.

I urge a "yes" vote on S. 738, as amended.

Mr. Speaker, I reserve the balance of my time.

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20 S. Proc., Pt. 5, 1977 Sess.
Pages 1933-1934

Tuesday, May 10, 1977

* * *

THE CLERK:

Please turn to page fourteen of the Calendar, top of the page, Cal. 721, File 868. Favorable report of the joint standing Committee on Judiciary. Substitute for *Senate Bill 411*. AN ACT MAKING AGREEMENTS EXEMPTING OWNERS AND CONTRACTORS FROM LIABILITY FOR NEGLIGENCE, VOID AND UNENFORCEABLE.

THE PRESIDENT:

Senator Ballen.

SENATOR BALLEN: (28th)

Mr. President, I would move acceptance of the joint committee's favorable report and passage of the bill.

THE PRESIDENT:

Will you remark, Senator?

SENATOR BALEEN:

Yes, Mr. President, this bill would declare void and against policy any agreement entered into in connection with a construction contract which relieves a person from liability for damages arising out of bodily injury to persons or damage to property

caused by or resulting from his negligence or the negligence of his agents or employees. Contracts affected by this bill would include those for construction, alteration, repair or maintenance of a building, including moving, demolition and excavation. The bill would not affect the validity of any insurance contract or compensation agreement or other agreement issued by a licensed insurer. The provisions of the bill would affect contracts and agreements entered into on or after thirty days succeeding the effective date of the bill.

THE CLERK:

The Clerk does have an amendment which changes the date. The Clerk has *Senate Amendment Schedule A*, File 868, Substitute Senate Bill 411, LCO 8517, copies were not made. It simply says in line 1, strike section 1. Strike Section 2 in its entirety.

SENATOR DEPIANO:

The amendment basically says that the bill will become effective on October first of 1976?[sic]instead of upon passage. If there is no objection, I move that it be passed.

THE PRESIDENT:

The question is on the adoption of Senate Amendment Schedule A. Will you remark further? If not, all in favor say Aye. Opposed Nay. The Ayes have it. THE AMENDMENT IS *ADOPTED*.

SENATOR BALLEN:

If there is no objection, Mr. President, I would move the bill as amended to be placed on the *Consent* Calendar.

THE PRESIDENT:

Without objection, so *ord-ered* [sic].

* * *

20 H.R. Proc., Pt. 10, 1977 Sess.
Pages 4297-4305

House of Representatives Friday, May 20, 1977

* * *

THE CLERK:

Page six of the Calendar, Cal. 1101, substitute for *S.B. no. 411*, files 868 and 990, An Act Making Agreements Exempting Owners and Contractors from Liability for Negligence, Void and Unenforceable, as *amended by Senate Amendment Schedule A*. Favorable Report of the Committee on Judiciary.

MR. SPEAKER:

Representative Frankel.

MR. FRANKEL (121st):

Mr. Speaker, I move acceptance of the Joint Committee's Favorable Report and passage of the bill in concurrence with the Senate.

MR. SPEAKER:

The question is on acceptance of the Joint Committee's Favorable Report and passage of the bill in concurrence with the Senate and will you remark sir?

MR. FRANKEL (121st):

Mr. Speaker, there is a Senate Amendment A, L.C.O. No. 8517, I would ask the Clerk to call and I seek permission to summarize.

MR. SPEAKER:

The Clerk has L.C.O. 8517, Senate Amendment Schedule A. Would the Clerk please call?

THE CLERK:

Senate Amendment Schedule A, L.C.O. 8517, offered by Senator DePiano of the 23rd district.

MR. SPEAKER:

Is there any objection from any of the members of the Gentleman from the 121st to summarize? Please proceed sir.

MR. FRANKEL (121st):

Mr. Speaker. The amendment simply changes the effective date from the date of passage to October 1st, 1977. I move adoption of Senate Amendment Schedule A.

MR. SPEAKER:

The question's on adoption of Senate Amendment Schedule A. Would you remark? If not, all those in favor will indicate by saying aye. Those opposed? Senate *A is adopted* and ruled technical. Would you remark further on the bill as amended? Representative Frankel.

MR. FRANKEL (121st):

Mr. Speaker, thank you. This bill would nullify a provision which was contained in a construction contract when the provision grants immunity to

either of the parties for their future acts of neglience [sic]. There not [sic] a good reason why a party to a contract should be given a license negliently [sic]. In my opinion, it's contrary to fair principles of law. I believe the bill is a worthwhile bill and I encourage you to vote yes.

MR. SPEAKER:

Will you remark further on the bill.? Representative Scully.

MR. SCULLY (75th):

Mr. Speaker, a question to you to Mr. Frankel. Mr. Frankel is this a what is better known as a whole [sic] harmless agreement?

MR. FRANKEL (121st):

The provision of a contract which this seeks to nullify would be a so-called whole [sic] harmless provision or sometimes called a waiver of right, waiver of neglient [sic] claim.

MR. SCULLY (75th):

Through you again, Mr. Speaker. In other words, I contract with somebody to build a building for me and the contract between myself and the builder I requested he hold me harmless from any of his neglient [sic] acts, would this be eliminating that theory?

MR. FRANKEL (121stz [sic]):

Through you, sir, it would apply to both of the parties. In the event the builder was neglient [sic] by way of creating personal injury to people or damage to other individuals, you would be not as such responsible because of his so-called claim for immunity. Therefore, he would be responsible. By the same token, if you had done something neglient which would not likely be the case because you're a passive party to that contract. You in turn would be responsible.

* * *

MR. SPEAKER:

Please proceed sir.

MR. ZAMM (139th):

Mr. Frankel, would you indicate please whether or not this bill would pertain to municipalities?

MR. FRANKEL (121st):

Through you, Mr. Speaker, the comment I made to the last individual I believe would be applicable to situations such as this.

MR. ZAMM (139th):

Well in that case, if I may make some further comments, Mr. Speaker? I would have to oppose this bill, Mr. Speaker. I [sic] seems to me that when a municipality puts out a contract for 10 million dollars school it should not be burdened with any

liability or obligations that might result because of the contractors liability and I think we're imposing additional burdens on the instrumentalities of Government and I would have to oppose this bill for that reason, Mr. Speaker. Thank you.

MR. SPEAKER:

Representative Frankel.

MR. FRANKEL (121st):

Mr. Speaker, for the second time, perhaps there is some misunderstanding and a situation addresses itself to where a municipality was hiring a contractor to do certain construction work. The contractor would be liable and could not by any contractural [sic] provision avoid his liability for his neglient acts. The municipality would be a passive agent, would be doing, nothing and as such I can hardly imagine that there would be any neglience involved. But clearly if the municipality, one of its agents or one of its servants did something in a neglient matter, then likewise, the municipality should be responsible in that case. But I think clearly the concept of this is to the active party. The party who's likely to be causing any neglient act. That would be the contractor because the municipality takes no active part in these contracts. So for all practical purposes, it would effect nothing because in the first instances, I can't imagine any municipality including my own which would allow such a clause, in the first place. But even if there was such a clause, a municipality would be protected rather than the contractor.

MR. SPEAKER:

Representative Hanlon.

MR. HANLON (70th):

Mr. Speaker, through you, Mr. Speaker, a question to the Gentleman reporting out the bill.

MR. SPEAKER:

Please proceed sir.

MR. HANLON (70th):

Through you, Mr. Speaker, would you please indicate who proposed this legislation?

MR. SPEAKER:

Representative Frankel.

MR. FRANKEL (121st):

Through you, Mr. Speaker, I am not aware of the proponent. It's my understanding that it originally went from State Urban to the Judiciary Committee which finally sent the favorable report out.

MR. HANLON (70th):

Through you, Mr. Speaker, if I can direct a question to the chairman of the State Urban and Development Committee in the chamber. I would ask the same question.

MR. SPEAKER:

Apparently the chairman is not in the chamber.

MR.HANLON (70th):

Through you, Mr. Speaker, question to the Gentleman reporting out the bill. Can you explain the reasons for the exclusion on lines 14 through 16 that is that the action not provide the validity of insurance contracts, workmens compensation agreement, etc?

MR. SPEAKER:

Representative Frankel.

MR. FRANKEL (121st):

Through you, Mr. Speaker, yes, insurance companies are in the business of holding harmless individuals for acts of neglience, so if we did not exempt them, in effect we would not be nullifing [sic] insurance contracts in the State of Connecticut:

MR. HANLON (70th):

Mr. Speaker, I share Representative Zamm's concerns about this legislation. I am not entirely convinced that the municipality or the State of Connecticut for that matter could not be held responsible as jointly with a contractor particularly in a case where such a case where a contractor builds a wall to wall full sound of interest and that wall is built on the municipalities land. I'm very concerned about it. I question the motivations behind this legislation, exactly who it's trying to protect. I certainly don't think it's going to protect municipalities in the State of Connecticut. I think it's misguided and I urge rejection of the bill.

MR. SPEAKER:

Are you prepared to vote? Will members please take their seats, staff and guests please come to the well of the House, the machine will be opened. Have all the members voted and is your vote properly recorded? If so, the machine will be closed and the Clerk will take a tally. The Clerk will please announce the tally.

THE CLERK:

Total number voting	142
Necessary for Passage	72
Those voting Yea	99
Those voting Nay	43
Those absent and not voting	9

MR. SPEAKER:

The *bill as amended is passed.*

* * *

44 H.R. Proc., Pt. 18, 2001 Session
Pages 005940-005944

House of Representatives Friday, June 1, 2001

The question is on acceptance and passage. Please proceed, sir.

REP. FOX: (144TH)

Thank you, Madam Speaker. The underlying bill has been before this body previously, previously adopted by this body and then has gone up to the Senate where an amendment was added.

For summary purposes, the underlying bill requires home improvement contracts in which a contractor advances or loans money, which contains a finance charge, to comply with certain requirements, including the Truth in Lending Act. It allows the payoff of the full amount in advance and sets a maximum finance charge.

The Senate, in its wisdom, Madam Speaker, adopted what became Senate "A". That is LCO number 7432. I would ask that that be called and I be allowed to summarize.

DEPUTY SPEAKER FRITZ:

Will the Clerk please call LCO number 7432, designated Senate "A".

CLERK:

LCO Number 7432, Senate "A" offered by Senator Colapietro.

DEPUTY SPEAKER FRITZ:

Representative Fox.

REP. FOX: (144TH)

Thank you, Madam Speaker. This is an amendment that incorporates a bill which we had in General Law and which was adopted by General Law, but kind of got lost in the shuffle.

Under existing law, there's a public, policy against indemnification and hold harmless agreement [sic] associated with certain construction contracts as exists and the prohibition provides that you cannot have such an agreement if it [sic] for the sole negligence of another.

In the days of comparative negligence, this would provide that any such agreement, whether it's sole or not, would be against public policy.

I think it's an appropriate amendment and I urge its adoption, Madam. Speaker.

DEPUTY SPEAKER FRITZ:

The question is on adoption. Will you remark further on the amendment? Will you remark further on the amendment?

If not, let me try – Representative Len Greene.

REP. GREENE: (105TH)

Thank you, Madam Speaker. I just wanted to rise in support of this amendment.

As Representative Fox indicated, this amendment kind of derived out of a bill we had in the General Law Committee and I had some problems with the original concept of the bill and some questions on it, but what we've ended up with is this kind of sole word change and I think it's appropriate with the changes right now that are going on in the construction industry.

I think this works very well and I urge its adoption.

Thank you.

DEPUTY SPEAKER FRITZ:

Thank you, sir.

Will you remark further on the amendment? Will you remark further on the amendment?

If not, let me try your minds. All those in favor – Representative Prelli.

REP. PRELLI: (63RD)

Thank you, Madam Speaker. And Madam Speaker, a question, through you, to the Chairman of the General Law Committee.

DEPUTY SPEAKER FRITZ:

Please proceed, sir.

REP. PRELLI: (63RD)

Through you, Madam Speaker. Representative Fox, and you might have said this and I'm sorry if

I didn't pick it up. I was trying to get a copy of the amendment.

What is the result of taking out "sole negligence" in this language and just making it, "negligence"? And what is the underlying result?

Through you, Madam Speaker.

DEPUTY SPEAKER FRITZ:

Representative Fox.

REP. FOX: (144TH)

Through you, Madam Speaker. It is a more equitable and fair statute. Previously, the indemnification – one could have been 99% negligent and you would have had to indemnify that person. Now, under our comparative negligence statutes, it is more equitable and it is inappropriate even if the breakdown is 1%-99%.

DEPUTY SPEAKER FRITZ:

Representative Prelli.

REP. PRELLI: (63RD)

Thank you, Madam Speaker. And I thank the gentleman for his answer.

DEPUTY SPEAKER FRITZ:

Thank you, sir.

Will you remark further on the amendment? Will you remark further on the amendment?

If not, let me try your minds.

All those in favor, signify by saying aye.

REPRESENTATIVES:

Aye.

DEPUTY SPEAKER FRITZ:

Those opposed. *The ayes have it. The amendment is adopted.*

* * *

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

David E. ROBERTS, Administrator for the Estate of Gregory J. Roberts, Plaintiff,	:	
v.	:	Case No. 3:04cv1318 (PCD)
NATIONAL RAILROAD PASSENGER CORPORATION, Defendant/ Third-Party Plaintiff	:	Case No. 3:04cv1622 (PCD) Case No. 3:04cv2195 (PCD)
v.	:	
O&G INDUSTRIES, INC., Third-Party Defendant.	:	

PLAINTIFF'S EXHIBIT 1

NATIONAL RAILROAD PASSENGER CORPORATION
TEMPORARY PERMIT TO ENTER UPON PROPERTY
C.E.-17
(REVISED 3/21/03)

Date: October 3, 2003
File: E-47-O-33
W.O.: 894579

(Filed Nov. 4, 2003)

ATTN: John P. Gemetro, Jr.

1. TEMPORARY PERMISSION. Temporary permission is hereby granted to O&G Industries, Inc., 112 Wall Street, Torrington, CT 06790-5464 (hereinafter called "Permittee"), to enter property owned and/or controlled by the National Railroad Passenger

Corporation (hereinafter called "Railroad"), for the purpose of reconstructing O.H. Bridge 78.02, I-95 (CDOT Project 43-122) in East Haven, State of Connecticut under the terms and conditions set forth below:

2. LOCATION AND ACCESS. (Give map reference, description or both)

East Haven, CT, O.H. Bridge 78.02, I-95
(CDOT Project 43-122)

(hereinafter called "Property").

3. INDEMNIFICATION. The Permittee shall defend, indemnify and hold harmless Railroad, its officers, directors, employees, agents, servants, successors, assigns and subsidiaries, irrespective of their negligence or fault, from and against any and all losses and liabilities, penalties, fines, forfeitures. demands, claims, causes of action, suits, costs and expenses incidental thereto (including cost of defense and attorney's fees), which any or all of them may hereafter incur, be responsible for, or pay as a result of injury, death, disease, or occupational disease to any person, and for damage (including environmental contamination and loss of use) to or loss of any property, including property of Railroad, arising out of or in any degree directly or indirectly caused by or resulting from activities of or work performed by Permittee, its officers, employees, agents, servants, contractors, subcontractors, or any other person acting for or by permission of Permittee. The foregoing obligation shall not extend to situations where the

negligence or fault of Amtrak, its officers, directors, employees, agents, servants, successors, assigns or subsidiaries, is the sole causal negligence or fault, except that it shall so extend to injury, death, disease, or occupational disease to employees of the Permittee, its agents, servants, contractors, subcontractors, or any other person acting for or by permission of the Permittee. The foregoing obligation shall not be limited by the existence of any insurance policy or by any limitation on the amount or type of damages, compensation, or benefits payable by or for Permittee or any contractor or subcontractor, and shall survive the termination of this permit for any reason. As used in this paragraph, the term "Railroad" includes the National Railroad Passenger Corporation, its subsidiaries, all commuter agencies and other railroads, and their respective officers, directors, employees, agents, servants, successors, assigns and subsidiaries.

4. CONSIDERATION FOR PREPARATION OF TEMPORARY PERMIT. Permittee will pay to Railroad the sum of One Dollar ($1.00), the receipt of which is hereby acknowledged, as compensation for the preparation of this Temporary Permit.

5. STARTING OF USE OF PROPERTY. Permittee shall notify Railroad's Deputy Chief Engineer-Construction, or his designee, at least ten (10) days in advance before entering upon, or starting any work on, the Property. No entry upon or use of the Property will be permitted until a fully executed copy of this Temporary Permit is returned to Railroad, and

specific permission to enter upon the Property is received from Director Project Initiation & Development, 30th Street Station, Philadelphia, PA 19104, telephone number 215-349-1127.

6. RAILROAD OPERATIONS. All activities by or on behalf of Permittee (and all contractors, subcontractors and/or any other entity or person acting for or by permission of Permittee (hereinafter collectively called "Contractors shall be performed so as not to interfere with Railroad's operations or with any of Railroad's facilities. In no event shall personnel, equipment or material cross a track or tracks without special advance permission from Railroad's Deputy Chief Engineer-Construction or his designee. If, in the opinion of Railroad's Deputy Chief Engineer-Construction or his designee, conditions warrant at any time, Railroad will provide flag service and/or other protection at the sole cost and expense of Permittee, and Permittee agrees to pay to Railroad the full cost and expense therefor.

7. CLEARANCES. All equipment and material of Permittee and Contractors shall be kept at all times not less than fifteen (15) feet from the centerline of the outside track, unless specifically otherwise authorized in writing by Railroad's Deputy Chief Engineer-Construction or his designee. Permittee and Contractors shall conduct all operations so that no part of any equipment shall foul an operated track; transmission, communication or signal line; or any other structure or facility of Railroad.

8. RESTORATION OF PREMISES. Upon completion of its work, Permittee and Contractors shall, at the option of Railroad, (a) leave the Property in a condition satisfactory to Railroad or, (b) restore the Property to its original condition. This may include, without limitation, the restoration of any fences removed or damaged by Permittee or Contractors.

9. TERM OF PERMIT. This Temporary Permit shall commence on the date Railroad receives a fully executed copy of this Temporary Permit pursuant to paragraph 15 hereof and shall extend until the end of the period Railroad determines is necessary for Permittee to accomplish the purpose set forth in Paragraph 1; provided, however, Railroad reserves the right to revoke this Temporary Permit at any time, and in no event shall this Temporary Permit extend beyond completion of CDOT Project 43-122 work over Amtrak's right-of-way. Under no circumstances shall this Temporary Permit be construed as granting to Permittee or Contractor's any right, title or interest of any kind or character in, on, or about any property of Railroad.

10. PROTECTION. All work in, on, or about the Property shall be in accordance with the document entitled "SPECIFICATIONS REGARDING SAFETY AND PROTECTION OF RAILROAD TRAFFIC AND PROPERTY," a copy of which is attached hereto as Attachment A and incorporated herein by reference.

11. [Redacted]

12. SAFETY ORIENTATION CLASS. No person may enter within twenty-five (25) feet of the Property until he/she has attended Railroad's Safety Orientation Class, as noted in paragraph (12) of Attachment A.

13. COMPLIANCE BY CONTRACTORS. Permittee shall take all steps necessary to assure that Contractors comply with the terms and conditions of this Temporary Permit.

14. LABOR CHARGES: PAYMENTS. Railroad's labor charges will be billed to Permittee at Railroad's standard force account rates. Except as specified in Paragraph 4 hereof, all costs, payments and other amounts due from Permittee to Railroad under this Temporary Permit shall be due and payable within thirty (30) days from the date of invoice therefor. Permittee shall have no right to set off against any payment due under this Temporary Permit any sums which Permittee may believe are due to it from Railroad for any reason whatsoever. In the event that Permittee shall fail to pay, when due, any amount payable by it under this Temporary Permit, Permittee shall also pay to Railroad, together with such overdue payment, interest on the overdue amount at an annual rate of six (6) percentage points over and above the rate published from time to time by *The Wall Street Journal* as the prime commercial lending rate (or the highest rate allowed by law, if less than the foregoing), calculated from the date the payment was due until paid. All payments due from Permittee to Railroad hereunder shall be: (a) made by check

drawn from currently available funds; (b) deemed made only upon receipt by Railroad of collected funds; (c) made payable to National Railroad Passenger Corporation; and (d) delivered to the National Railroad Passenger Corporation, P.O. Box 18266F, St. Louis, Missouri, 63150. All payment obligations of Permittee under this Temporary Permit shall survive the termination or expiration of this Temporary Permit.

15. ENVIRONMENTAL TESTS AND STUDIES. Permittee shall not perform any environmental tests or studies (e.g., air, soil or water samples) unless specifically identified and authorized in paragraph (1) of this Temporary Permit. If any such tests or studies are performed, Permittee shall promptly furnish to Railroad, at no cost, a copy of the results including any reports or analyses obtained or compiled. Except as may be required by applicable law, Permittee shall not disclose the results of any such tests or studies to anyone other than Railroad or Permittee's client. Failure to comply with the provisions of this clause shall result in immediate termination of this Temporary permit and forfeiture of all compensation paid Railroad therefor.

16. ACCEPTANCE. To confirm acceptance of this Temporary Permit, one fully executed copy must be returned to: Director Project Initiation & Development, National Railroad Passenger Corporation, 30th Street Station, Philadelphia, PA 19104. The second copy may be retained for your file.

NATIONAL RAILROAD PASSENGER CORPORATION

By: /s/ [Illegible]
FRANK A. VACCA
DEPUTY CHIEF ENGINEER
CONSTRUCTION

Date: 10/3/03

AGREED TO AND ACCEPTED:

O & G INDUSTRIES, INC.

By: /s/ David M. Oneglia
(signature)

Title: President
Must be an Owner/Partner
or duly authorized
representative

Date: 10/30/03

ATTACHMENT A
Temporary Permit to Enter Upon Property

SPECIFICATIONS REGARDING SAFETY AND PROTECTION OF RAILROAD TRAFFIC AND PROPERTY (Revised 2/26/03)

National Railroad Passenger Corporation (Railroad)

In the following Specifications "Chief Engineer" shall mean Railroad's Chief Engineer and/or his duly authorized representative. "Railroad" shall mean the National Railroad Passenger Corporation.

(1) *Pre-Entry Meeting*: Before entry of Permittee and/or Contractors onto Railroad's property, a pre-entry meeting shall be held at which time Permittee and/or Contractors shall submit for written approval of the Chief Engineer, plans, computations and a detailed description of proposed methods for accomplishing the work, including methods for protecting Railroad's traffic. Any such written approval shall not relieve Permittee and/or Contractor of their complete responsibility for the adequacy and safety of their operations.

(2) *Rules, Regulations and Requirements*: Railroad traffic shall be maintained at all times with safety and continuity, and Permittee and/or Contractors shall conduct their operations in compliance with all rules, regulations, and requirements of Railroad (including these Specifications) with respect to any work performed on, over, under, within or adjacent to Railroad's property. Permittee and/or Contractors shall be responsible for acquainting themselves with

such rules, regulations and requirements. Any violation of Railroad's safety rules, regulations, or requirements shall be grounds for the immediate suspension of the Permittee and/or Contractor work, and the re-training of all personnel, at the Permittee's expense.

(3) *Maintenance of Safe Conditions*: If tracks or other property of Railroad are endangered during the work, Permittee and/or Contractor shall immediately take such steps as may be directed by Railroad to restore safe conditions, and upon failure of Permittee and/or Contractor to immediately carry out such direction, Railroad may take whatever steps are reasonably necessary to restore safe conditions. All costs and expenses of restoring safe conditions, and of repairing any damage to Railroad's trains, tracks, right-of-way or other property caused by the operations of Permittee and/or Contractors, shall be paid by Permittee.

(4) *Protection in General*: Permittee and/or Contractors shall consult with the Chief Engineer to determine the type and extent of protection required to insure safety and continuity of railroad traffic. Any Inspectors, Track Foremen, Track Watchmen, Flagman, Signalmen, Electric Traction Linemen, or other employees deemed necessary by Railroad, at its sole discretion, for protective services shall be obtained from Railroad by Permittee and/or Contractors. The cost of same shall be paid directly to Railroad by Permittee. The provision of such employees by Railroad, and any other precautionary measures taken by

Railroad, shall not relieve Permittee and/or Contractors from their complete responsibility for the adequacy and safety of their operations.

(5) *Protection for Work Near Electrified Track or Wire*: Whenever work is performed in the vicinity of electrified tracks and/or high voltage wires, particular care must be exercised, and Railroad's requirements regarding clearance to be maintained between equipment and tracks and/or energized wires, and otherwise regarding work in the vicinity of electrified tracks, must be strictly observed. No employees or equipment will be permitted to work near overhead wires, except when protected by a Class A employee of Railroad. Permittee and/or Contractors must supply an adequate length of grounding cable (4/0 copper with approved clamps) for each piece of equipment working near or adjacent to any overhead wire.

(6) *Fouling of Track or Wire*: No work will be permitted within twenty-five (25) feet of the centerline of track or the energized wire or have potential of getting within twenty-five (25) feet of track wire without the approval of the Chief Engineer's representative. Permittee and/or Contractors shall conduct their work so that no part of any equipment or material shall foul an active track or overhead wire without the written permission of the Chief Engineer's representative. When Permittee and/or Contractors desire to foul an active track, they must provide the Chief Engineer's representative with their site-specific work plan a minimum of twenty-one (21)

working days in advance, so that, if approved, arrangements may be made for proper protection of Railroad. Any equipment shall be considered to be fouling a track or overhead wire when located (a) within fifteen (15) feet from the centerline of the track or within fifteen (15) feet from the wire, or (b) in such a position that failure of same, with or without a load would bring it within fifteen (15) feet from the centerline of the track or within fifteen (15) feet from the wire and requires the presence of the proper Railroad protection personnel.

If acceptable to the Chief Engineer's representative, a safety barrier (approved temporary fence or barricade) may be installed at fifteen (15) feet from centerline of track or overhead wire to afford the Permittee and/or Contractor with a work area that is not considered fouling. Nevertheless, protection personnel may be required at the discretion of the Chief Engineer's representative.

(7) *Track Outages*: Permittee and/or Contractors shall verify the time and schedule of track outages from Railroad before scheduling any of their work on, over, under, within, or adjacent to Railroad's right-of-way. Railroad does not guarantee the availability of any track outage at any particular time. Permittee and/or Contractors shall schedule all work to be performed in such a manner as not to interfere with Railroad operations. Permittee and/or Contractors shall use all necessary care and precaution to avoid accidents, delay or interference with Railroad's trains or other property.

(8) *Demolition*: During any demolition, the Contractor must provide horizontal and vertical shields, designed by a Professional Engineer registered in the state in which the work takes place. These shields shall be designed in accordance with the Railroad's specifications and approved by the Railroad, so as to prevent any debris from falling onto the Railroad's right-of-way or other property. A grounded temporary vertical protective barrier must be provided if an existing vertical protective barrier is removed during demolition. In addition, if any openings are left in an existing bridge deck, a protective fence must be erected at both ends of the bridge to prohibit unauthorized persons from entering onto the bridge.

(9) *Equipment Condition*: All equipment to be used in the vicinity of operating tracks shall be in "certified" first-class condition so as to prevent failures that might cause delay to trains or damage to Railroad's property. No equipment shall be placed or put into operation near or adjacent to operating tracks without first obtaining permission from the Chief Engineer's representative. Under no circumstances shall any equipment or materials be placed or stored within twenty-five (25) feet from the centerline of an outside track, except as approved by the Site Specific Safety Work Plan. To insure compliance with this requirement, Permittee and/or Contractors must establish a twenty-five (25) foot foul line prior to the start of work by either driving stakes, taping off or erecting a temporary fence, or providing an alternate method as approved by the Chief Engineer's

representative. Permittee and/or Contractors will be issued warning stickers which must be placed in the operating cabs of all equipment as a constant reminder of the twenty-five (25) foot clearance envelope.

(10) *Storage of Materials and Equipment*: No material or equipment shall be stored on Railroad's property without first having obtained permission from the Chief Engineer. Any such storage will be on the condition that Railroad will not be liable for loss of or damage to such materials or equipment from any cause.

(11) *Condition of Railroad's Property*: Permittee and/or Contractors shall keep Railroad's property clear of all refuse and debris from its operations. Upon completion of the work, Permittee and/or Contractors shall remove from Railroad's property all machinery, equipment, surplus materials, falsework, rubbish, temporary structures, and other property of the Permittee and/or Contractors and shall leave Railroad's property in a condition satisfactory to the Chief Engineer.

(12) *Safety Training*: All individuals, including representatives and employees of the Permittee and/or Contractors, before entering onto Railroad's property or coming within twenty-five (25) feet of the centerline of the track or energized wire shall first attend Railroad's Safety Contractor/Leasee Employee Training Class. The Safety Orientation Class will be provided by Railroad's Safety Representative at

Permittee's expense. A photo I.D. will be issued and must be worn/displayed while on Railroad property. All costs of complying with Railroad's safety training shall be at the sole expense of Permittee. Permittee and/or Contractors shall appoint a qualified person as their Safety Representative. He/she shall continuously assure that all individuals comply with Railroad's safety requirements. All safety training records shall be maintained with site specific work plan.

(13) *No Charges to Railroad*: It is expressly understood that neither these Specifications, nor any document to which they are attached, include any work for which Railroad is to be billed by Permittee and/or Contractors, unless Railroad gives a written request that such work be performed at Railroad's expense.

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No. 08-895

FILED
MAR 9 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

O&G INDUSTRIES, INC.,

Petitioner,

- against -

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

MARK S. LANDMAN
Counsel of Record
WILLIAM G. BALLAINE
MICHAEL A. JOSEPH
LANDMAN CORSI BALLAINE & FORD P.C.
120 Broadway
New York, New York 10271
(212) 238-4800

Attorneys for Respondent National Railroad Passenger Corporation

March 10, 2009

QUESTION PRESENTED

1. Should this Court review the Court of Appeals' determination that 49 U.S.C. § 28103(b), which authorizes Respondent National Railroad Passenger Corporation to enter into indemnity contracts that allocate financial responsibility for claims against it, preempts the Connecticut statute that Petitioner argues may nullify its indemnity obligation to Respondent, where the Connecticut statute stands as a substantial obstacle to the full purposes and objectives of Congress as revealed by the text of § 28103(b), the entire legislative scheme and the relevant Senate and House Committee Reports?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent National Railroad Passenger Corporation, a corporation providing intercity passenger rail service, has no parent company. However, American Premiere Underwriters, Inc., and Burlington Northern Santa Fe Railroad Company own 10% or more of Respondent's stock.

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STATEMENT OF THE CASE

Stripped of the numerous issues resolved in protracted proceedings below, what remains of this lawsuit represents the last-ditch effort by Petitioner O&G Industries, Inc. ("O&G") to avoid its contractual indemnity obligations to Respondent National Railroad Passenger Corporation ("Amtrak") under an October 2003 Temporary Permit to Enter Upon Property (the "Agreement"). App. 7. [1]

Both the U.S. District Court for the District of Connecticut (App.48, 62-78) and the U.S. Court of Appeals for the Second Circuit (App. 1, 12-21) carefully reviewed and rejected Petitioner's efforts to repudiate this Agreement by relying upon on a state statute that violated the plain language and the spirit of 49 U.S.C. § 28103(b).[2] App. 21, 75. Petitioner has not cited to a single decision anywhere that conflicts with these lower court determinations.

The contested Agreement, which provided no benefit to Amtrak, allowed Petitioner access to Amtrak's property to perform construction work for the Connecticut Department of Transportation relating to the rebuilding of an interstate highway between New Haven and Branford, Connecticut, in the Northeast Corridor. App. 7, 63-64. Petitioner's work necessarily involved fouling -- that is, obstructing --

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[1] Any reference to "App. __" is to the Appendix to the Petition for A Writ of Certiorari filed by Petitioner herein.

[2] The Second Circuit's Opinion is reported at 537 F.3d 153 (2d Cir. 2008).

Amtrak's active Northeast Corridor tracks at the O&G worksite. *See* App. 6, 7, 49-54, 59.

Under the Agreement, Petitioner undertook to "use all necessary care and precaution to avoid accidents, delay or interference with [Amtrak's] trains or property" and to abide by Amtrak's safety regulations. App. 7. Amtrak agreed to provide certain flag protection and other protection necessary to maintain the "safety and continuity of railroad traffic" over which Amtrak maintained exclusive control. App. 7. However, the provision of protective services would "not relieve [Petitioner] from [its] complete responsibility for the adequacy and safety of [its] operations." App. 7.

As a key element of the consideration Amtrak received in exchange for allowing O&G perform work on Amtrak's property that would necessarily interfere with its rail passenger service operations, O&G agreed, inter alia, that it would defend, indemnify and hold harmless Amtrak "irrespective of [Amtrak's] negligence or fault, from and against any and all losses and liabilities, . . . claims causes of action . . . arising out of or . . . resulting from activities or the work performed by [O&G or] its . . . employees." App. 7-8. This indemnity provision applies, by its unambiguous terms, to two underlying tort claims that were resolved in the proceedings below, claims which stemmed from an injury to and a death suffered by O&G employees while they were performing work on

Amtrak's property pursuant to the parties' Agreement. App.5-6, 17-18, 21.[3]

In its Petition, O&G complains that the U.S. District Court for the District of Connecticut and the U.S. Court of Appeals for the Second Circuit each erred by rejecting Petitioner's attempt to avoid its contractual obligation under the Agreement's indemnity provision based upon Conn. Gen. Stat. §52-572k,[4] which declares void as against public policy agreements in construction contracts to indemnify a party against its own negligence.[5] *See* App. 1-33 (reprinting the Second Circuit's Opinion); App. 34-47 and App. 48-76 (reprinting, respectively, the district court's ruling granting judgment notwithstanding the verdict and its earlier ruling granting summary judgment). As both the district court and the court of appeals found, however, enforcement of the Connecticut statute would violate both the plain language and the spirit of 49 U.S.C. § 28103(b), which

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[3] The district court below found that a third underlying tort claim, involving an injury to an individual who was not employed by O&G, was not covered by the Agreement's indemnification provision.

[4] The Connecticut statute, which only applies to construction contracts, is reprinted at App. 83.

[5] In the Court of Appeals for the Second Circuit, Amtrak contended in the alternative that the Agreement with Petitioner was not a construction contract subject to Conn. Gen. Stat. § 52-572k; the Second Circuit did not, however, address the substance of this argument, finding that it had been waived and was, in any event, of little importance because of the Court's decision on the preemption issue. App. 12-13 and n. 6.

broadly authorizes Amtrak to "enter into contracts that allocate financial responsibility for [any] claims [against Amtrak]." 49 U.S.C. § 28103(b) and (e). *See* App. 16-21, 71-75. The lower courts held that as a result, the Connecticut statute stands as a clear obstacle to the full accomplishment of Congress' objectives in enacting this specific provision as part of the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, December 2, 1997, 111 Stat., 2570 (the "Amtrak Reform Act"), legislation enacted to alleviate Amtrak's severe financial problems and allow rail passenger transportation providers like Amtrak to enter into enforceable indemnity agreements with other parties that would not be nullified by any state law or policy. *Id.*

As discussed in greater detail below, O&G's Petition rests fitfully on a series of false premises. First, Petitioner professes to find ambiguity in the federal statute at issue. The statute, however, is not ambiguous; it is broad.

Next, Petitioner professes to find a narrow Congressional purpose and intent in the legislative history that somehow justifies O&G's attempt to rely on the Connecticut statute to renege on its contractual indemnity obligation. The applicable Senate and House Committee Reports, however, reinforce the clear and manifest purpose and intent behind the federal statute's broad language and undermines Petitioner's effort to avoid its agreement to indemnify.

Petitioner also suggests that this dispute provides the Supreme Court with the chance to clarify

what O&G characterizes as the confusing and uncertain scope of the Court's implied preemption doctrine. Petition at 33. Petitioner is wrong. The straightforward question here is whether the Connecticut statute stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress in enacting § 28103 (b), resolution of which calls for "a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purposes and intended effects." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000). That is precisely what the Second Circuit Court of Appeals did in its Opinion before arriving at a determination that is fully supported by the relevant federal statute and legislative history.

Finally, Petitioner complains that the Second Circuit's Opinion failed to expressly acknowledge a presumption against federal preemption. But the only real question is whether the Connecticut statute "presents a sufficient obstacle to the full accomplishment of Congress' objectives" under the applicable federal statute. *Crosby*, 530 U.S. at 374, n. 8. Clearly, in this case, it does, fully warranting invocation of federal preemption.

For reasons more fully described in the following section, there is no compelling reason for this Court to grant O&G's Petition. The conclusion reached by the lower courts in this case is consistent with this Court's standards for resolving the conflict preemption issue presented here. Moreover, Petitioner cannot point to any other decisions in the lower courts

addressing this specific federal statute. This case thus presents no split in the circuits and suggest no lower court confusion over the preemptive effect of § 28103(b). Accordingly, this Court should deny the Petition.

REASONS FOR DENYING THE WRIT

Consideration of the Petition begins with the fundamental proposition that Congress has the unquestioned constitutional power to preempt state law under the Supremacy Clause, Art. VI, cl. 2 of the United States Constitution. *See Gibson v. Ogden*, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824). Moreover, this Court has repeatedly and consistently instructed that a state law must yield to a congressional enactment *even without* an express provision for preemption. *Crosby*, 530 U.S. at 372; *United States v. Locke*, 529 U.S. 89, 109-12 (2000); *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989); *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941).

Thus, this Court "will find preemption where . . . 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby*, 530 U.S. at 373, quoting *Hines*, 312 U.S. at 67; *see, e.g., Clean Air Markets Group v. Pataki*, 338 F.3d 82, 87 (2d Cir. 2003); *Bedford Affiliates v. Sills*, 156 F.3d 416, 426-27 (2d Cir. 1998); *see also Cox Cable Advisory Council v. Dep't of Public Utility Control*, 259 Conn. 56, 62-63, 788 A.2d 29, 33 (2002). This, in shorthand terms, is commonly referred to as conflict preemption pursuant to the Supremacy Clause.

There is no confusion or uncertainty about the basic standards for determining whether to invoke conflict preemption under the Supremacy Clause. In *Crosby*, 530 U.S. 363, this Court unanimously held that a Massachusetts law restricting the authority of its agencies to purchase goods or services from companies doing business with Burma was invalid under the Supremacy Clause of the U.S. Constitution owing to its threat of frustrating federal statutory objectives. *Crosby*, 530 U.S. at 366. In the majority opinion by Justice Souter, joined in by six other Justices, the Court clearly articulated applicable standards for analyzing conflict preemption. *Crosby*, 530 U.S. at 372-74.[6]

The Court's task is to examine the federal statute "as a whole" and identify "its purposes and intended effects" and then make a judgment whether the obstacle presented by the state law is a "sufficient obstacle" to require preemption. *Crosby*, 530 U.S. at

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[6] Justice Scalia, in a concurring opinion in which Justice Thomas joined, concurred with the Court's judgment in *Crosby* but took issue with the majority opinion's citation to statements by sponsors of legislation, views expressed by individual legislators, statements of the executive branch and letters to Congressional committees. *Crosby*, 530 U.S. at 388-91 (Scalia, J., concurring). As hereafter discussed, the Second Circuit's conflict preemption finding is supported by the text of § 28103(b), the statutory scheme and the legislative history found in the relevant House and Senate Reports; there is no need to rely on the type of legislative sources with which the concurring opinion in *Crosby* takes issue.

373 and 374, n. 8. The "entire scheme of the statute must of course be considered, and that which needs must be implied is of no less force than that which is expressed." *Id.*, 530 U.S. at 373. If the statute's purpose "'cannot otherwise be accomplished -- if its operation . . . must be frustrated and its provisions be refused their natural effect -- [then] the state law must yield to the regulation of Congress within the sphere of its delegated power.'" *Id.*, 530 U.S. at 373 (*quoting Savage v. Jones*, 225 U.S. 501, 533 (1912), *also quoted in Hines*, 312 U.S. at 67, n. 20).

The state's historic police powers may be superseded by federal statute when that is the clear and manifest purpose of Congress. *Wyeth v. Levine,* -- S. Ct.--, 2009 WL 529172, *5 (U.S. March 4, 2009), (quoted citations omitted). "[T]he purpose of Congress is the ultimate touchstone." *Wyeth,* --S. Ct.--, 2009 WL 529172, at *5; *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987).

Measured against these standards, the Second Circuit's finding of conflict preemption does not, by any means, warrant further review by this Court.

The specific federal statute at issue is found in subsection (b) of § 28103, Title 49, United States Code, and, inter alia, reads as follows:

> (b) Contractual obligations. -- A provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims.

49 U.S.C. § 28103(b). Section 28103(b) was enacted as part of an array of legislative measures contained in the 1997 Amtrak Reform Act, reflecting, *inter alia*, Congress' grave concern over Amtrak's financial condition and its ability to compete effective in the intercity travel market. App. 118-123, 139-144. Section 28103(b) clearly empowers Amtrak to allocate financial responsibility for the underlying claims involved in this dispute by entering into the indemnification arrangement contained in Amtrak's Agreement with O&G.

First, there is no dispute that Amtrak is a "provider of rail passenger transportation" covered by subsection (b) of § 28103.

Second, there is no question that the underlying claims involved in this contractual dispute fall within the category of "claims" that are covered by subsection (b); the term "claims" in subsection (b) is broadly and unambiguously defined in subsection (e)(1)(A) to mean, in this case, "a claim made . . . against Amtrak." 49 U.S.C. § 28103(e)(1)(A).

Third, the Amtrak Agreement with O&G is unquestionably a "contract[ ] that allocate[s] financial responsibility for claims." The Agreement allocates to O&G full contractual responsibility for the two underlying claims arising out of an injury or death to O&G employees, "irrespective of [Amtrak's] negligence or fault . . . ." App. 7-8.

Petitioner argues that the language of § 28103(b) is ambiguous. It is not. Section 28103(b) is, rather, broad and unqualified, with no suggestion that the rail passenger transportation provider's right to "enter into contracts that allocate financial responsibility for claims" is subject to, or may be trumped by, any law or policy that bars an allocation which permits a negligent party to be indemnified. *Cf.,*; *Ngiraingas v. Sanchez,* 495 U.S. 182, 192 (1990) (observing that the Court is "not at liberty to seek ingenious analytical instruments' to avoid giving a congressional enactment the broad scope its language and origins may require")(*quoting United States v. Price,* 383 U.S., 787, 801 (1966) and *District of Columbia v. Carter,* 409 U.S. 418, 432 (1973)); *Altria Group, Inc. v. Good,* 129 S. Ct. 538, 548 (2008) (stressing that the Court's conclusion that a state-law claim was preempted in *American Airlines, Inc. v. Wolens,* 513 U.S. 219 (1995) turned on "the unusual breadth" of a federal statute's preemption provision).

The breadth of § 28103(b) points to one logical conclusion -- Congress intended to authorize providers of rail passenger transportation services, such as Amtrak, to enter into contracts allocating responsibility for claims without regard to any laws that might otherwise impair or nullify such arrangement.

In its effort to support the argument that the broad language of § 28103(b) is ambiguous, O&G contends that Congress meant to do nothing more than "give[ ] Amtrak the authority to enter into

indemnification agreements." Petition at 21. This interpretation is utterly implausible.

In the first place, § 28103(b) does not apply only to Amtrak. It applies, by its terms, to any "provider of rail passenger transportation." It takes a flight of fancy to believe that Congress enacted this provision out of concern that, absent Congress' specific authority, providers of rail passenger transportation may lack authority to enter into indemnity agreements allocating financial responsibility for claims. Moreover, there is not a shred of legislative history to support such an improbable notion

More important, Congress was well aware when § 28103(b) was enacted in December 1997 that Amtrak *already* had *full* authority to enter into indemnity contracts. Amtrak was created in 1971, pursuant to an Act of Congress, the Rail Passenger Service Act of 1970, in order to provide "modern, efficient, intercity rail passenger service." Rail Passenger Service Act of 1970, Pub. L. 91-518, § 101, 84 Stat. 1328; *see Lebron v. National R.R. Pass. Corp.*, 513 U.S. 374, 383-85 (1995). At that time, Congress specifically empowered Amtrak to own, manage, operate and contract for the operation of intercity rail passenger trains. Rail Passenger Service Act of 1970, § 305.

Congress also knew in 1997 that Amtrak had for many years been entering into and relying upon numerous contracts containing indemnification provisions in order to conduct its business. This is demonstrated by H.R. Rep. 105-251, the House

Committee Report underlying § 28103,[7] which specifically references the federal district court's 1988 decision in *National R.R. Pass. Corp. v. Consol. Rail Corp.*, 698 F. Supp. 951, 955-66 (D.D.C. 1988), *vacated on other grounds*, 892 F.2d 1066 (D.C. Cir. 1990). That decision discusses at great length the history behind indemnification contracts negotiated during the 1970's and 1980's between Amtrak and freight railroads over whose tracks Amtrak operate in many parts of the country outside of the Northeast Corridor. *See* App. 129.

Patently, therefore, Congress had no cause whatsoever to enact § 28103(b) in 1997 in order to give Amtrak contractual authority it had possessed and been exercising since its inception decades earlier. Accordingly, Petitioner's argument that § 28103(b) simply represents Congress' intention to give Amtrak authority to enter into indemnification agreements is implausible, if not frivolous.

In addition, both the Amtrak Reform Act, of which § 28103(b) is an integral part, and the legislative history underlying this legislation, provide powerful reinforcement for the conclusion that § 28103(b) was broadly intended to authorize Amtrak, and other rail passenger providers, to enter into indemnity agreements that would not be impaired or nullified by any other law or public policy.

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[7] H.R. Rep 105-251, from the U.S. House of Representatives Committee on Transportation and Infrastructure (Sept. 17, 1997), is reprinted at App. 110-138.

As a threshold matter, the Amtrak Reform Act includes specific findings that "intercity rail passenger service is an essential component of a national intermodal passenger transportation system," that "Amtrak is facing a financial crisis, with growing and substantial debt obligations severely limiting its ability to cover operating costs and jeopardizing its long-term viability," and that "immediate action is required to improve Amtrak's financial condition if Amtrak is to survive." Amtrak Reform Act, Pub. L. 105-134, 111 Stat. 2577, § 2. Similarly, S. Rep. 105-85, the Senate Committee Report underlying § 28103,[8] describes an "urgent need" for immediate action to improve Amtrak's financial condition, which was at a "crisis stage," in order to eliminate Amtrak's dependency on federal operating assistance and provide a series of statutory reforms aimed at reducing Amtrak's costs, increasing Amtrak's efficiencies and revenues, and improving Amtrak's financial condition. App. 141-144.

It is against this backdrop that Congress took a series of legislative measures, one of which was to enact the precise statutory language found in §28103(b). *See* Amtrak Reform Act, Pub. L. 105-134, 111 Stat. 2577, § 161(b). The Senate Report (No. 105-85) specifically explains that:

> this bill clarifies that *indemnification agreements* related to the provision of rail passenger service entered into by

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[8] S. Rep. 105-85, from the U.S. Senate Committee on Commerce, Science and Transportation (Sept. 24, 1997), is reprinted at App. 139-58.

> Amtrak and other parties *would be enforceable.*

App. 148 (emphasis added). The House Committee Report (No. 105-251) is, if anything, even more explicit:

> The bill . . . affirms that indemnity contracts between a passenger rail operator and any other party are fully enforceable without regard to any other law or public policy.

App. 117 (emphasis added). According to the House Committee Report, the "affirmation of the right of owners of rights-of-way and passenger operators to indemnify by contract" was "a crucial feature" of the legislative package. App. 127.

The legislative history thus makes very clear that Congress was explicitly concerned with the need to override state laws that might otherwise nullify indemnity agreements entered into by Amtrak or any other rail passenger transportation provider. The House Committee Report mentions by name the district court's decision in *National R.R. Pass. Corp. v. Consol. Rail Corp.*, 698 F. Supp. 951, which held that an indemnification agreement between Amtrak and freight railroad Conrail violated District of Columbia public policy and was unenforceable because it provided for contractual indemnification for a party's own willful, wanton, reckless or intentional conduct and shifted the burden of paying punitive damages

away from the wrongdoer. App. 124, 129; *see also National R.R. Pass. Corp. v. Consol. Rail Corp.*, 698 F. Supp. at 970-72.

The House Committee Report pointedly observes that "[b]ecause of the court ruling in . . . [the district court action], existing contractual indemnity agreements do not afford a reliable allocation of risk among contracting parties." App. 127. The Report states emphatically that "the public interest is best served through legislation providing that once rail passenger transportation agreements are negotiated, they will be enforced" and, as a result, "the Committee is overruling [the district court] case in order to restore the indemnitees' confidence in the enforceability of their indemnification agreements." App. 129.

The Senate Committee Report does not refer by name to the decision in *National R.R. Pass. Corp. v. Consol. Rail Corp.*, 698 F. Supp. 951, but this Report is equally clear that the purpose of enacting § 28103(b) is to negate any possibility of a state law nullifying indemnity agreements entered into by Amtrak or by other rail passenger providers:

> As long as there is the possibility that state laws can nullify the indemnification contracts [which allocate the cost of liability among the agreement parties], Amtrak and a freight railroad could find themselves litigating against each other or [sic] concerning their obligations to injured

> third parties. Amtrak believes that such litigation inevitably would not only adversely impact its business relationship with its host freight railroad, but it would also lead to significantly higher outlays in settlements and judgments to plaintiffs.

App. 155-156; *see also* App. 148.

In sum, the wording of § 28103(b) broadly, without qualification, authorizes Amtrak to enter into indemnity agreements that allocate financial responsibility for a claim against Amtrak. And the legislative history strongly reinforces Congress' clear purpose and intent -- these agreements are enforceable notwithstanding any law or public policy that one of the contracting parties may later seek to assert to avoid its indemnity obligations.

In the face of the broadly worded statute and the legislative history clearly debunking Petitioner's argument against preemption, O&G would have this Court grant review in order to redraft § 28103(b) in order to suit Petitioner's purposes. Its arguments for doing so are meritless.

First, Petitioner argues that indemnity contracts covered by § 28103(b) should be limited to contracts for the financial allocation of claims concerning just passenger injuries. Petition at 28. This, however, totally ignores the statute's clear wording. Congress specifically defined "claims"

covered by subsection (b) to include *any* claim against Amtrak. 49 U.S.C. § 28103(b) and (e). Congress could have easily defined "claims" covered by subsection (b) to refer, more narrowly, to the passenger claims that are the specific subjects of subsection (a) of § 28103, which sets forth specific monetary and punitive damage limitations on the liability of rail carriers, *inter alia*, for "a claim for personal injury to a passenger [or] death to a passenger . . . ." 49 U.S.C. § 28103(a). Plainly, however, Congress did not do so.

Petitioner is not asking the Court to adopt a plausible interpretation of ambiguous language in subsection (b). Petitioner is instead asking this Court to draft additional limiting language that Congress chose not to include. That, quite obviously, is a task constitutionally delegated to Congress, not to this Court.

Nor does the legislative history support Petitioner's argument. Petitioner does not point to a shred of legislative history indicating that Congress intended to provide for financial allocation of claims only if they involved injuries to passengers. Nor would that limitation make sense in the context of Congress' stated purposes. The Amtrak Reform Act, as previously noted, was enacted to address, *inter alia*, Congress' concern over Amtrak's financial "crisis" (App. 118-123, 140, 141-144), and one of the specific reasons for enacting § 28103(b) was to override state laws that, by nullifying Amtrak's indemnity agreements, would not only "adversely impact [Amtrak's] business relationship," but would also "lead to *significantly higher outlays* in settlements and

judgments to plaintiffs." App. 148 (emphasis added). This being so, there is absolutely no reason why Congress would choose to limit § 28103(b) to claims involving passengers as Congress was obviously aware that Amtrak's operations would require it to enter into indemnity arrangements that covered substantial personal injury claims by not just passengers, but non-passengers as well. *See, e.g., Alcorn v. Union Pac. R. Co*, 50 S.W.3d 226 (Mo. 2001) (Missouri Supreme Court upholds $25 million compensatory damage judgment for passenger in vehicle); *National R.R. Pass. Corp. v. Lexington Ins. Co.*, Civil No. 01-1815, 2003 WL 24045159, at *2 (D.C.C. May 20, 2003) (district court explaining that Amtrak was required to contractually indemnify Union Pacific for Alcorn's accident), *aff'd*, 365 F.3d 1104 (D.C.Cir. 2004); *Beausoleil v. National R.R. Pass. Corp.*, 145 F.Supp.2d 119 (D. Mass. 2001) (woman struck by Amtrak train while crossing tracks at MBTA-owned, Amtrak-operated station); *Justice v. CSX Transp.*, 908 F.2d 119 (7th Cir. 1990) (action on behalf of deceased husband whose truck entered onto CSXT's tracks and was struck by Amtrak's train).

Section 28103(b) clearly does not contain any language limiting indemnity contracts to passenger claims. And to engraft such a limitation onto subsection (b) would undermine the clear Congressional purpose and intent in enacting this provision.

Second, Petitioner argues that § 28103(b) should be limited to contracts for the financial allocation of claims entered into by Amtrak with other

railroads, not contractors like O&G. Petition at 28. Once again, Petitioner asks the Court to ignore the statute's text. Subsection (b) broadly covers *all* contracts entered into by a "provider of rail passenger transportation." 49 U.S.C. §28103(b). Thus, once again, Petitioner is asking this Court not to interpret subsection (b), but to re-write it.

The legislative history undermines, rather than supports, Petitioner's contention. Congress, as noted, was fundamentally concerned about the need to alleviate Amtrak's financial crisis. Congress thus had every reason to provide broadly for enforcement of all indemnification agreements entered into by Amtrak (and other providers) relating to the provision of rail passenger service. Moreover, that, according to the legislative history, is what Congress intended to do.

In addressing the indemnity issue, the House Committee Report states in the broadest possible terms that the bill "affirms that indemnity contracts between a passenger rail operator *and any other party* are fully enforceable without regard to any other law or public policy." App. 117 (emphasis added). The Senate Committee Report similarly states, in broad terms, that the bill makes enforceable "indemnification agreements related to the provision of rail passenger service entered into by Amtrak *and other parties*." (App. 148) (emphasis added).

Congress, to be sure, was motivated by a district court decision involving Amtrak and freight railroad Conrail, and was aware that in much of the country outside the Northeast Corridor Amtrak operates over

tracks owned by freight railroads pursuant to operating agreements that include indemnity arrangements. *See* App. 116, 123-24, 127, 129. As a result, the legislative history emphasizes the need to make sure that indemnification agreements between Amtrak and freight railroads would be enforceable notwithstanding any state law or policy.

But Congress was well aware that "Amtrak is staking the future of the national system on the projected financial success of high-speed rail service in the Northeast Corridor," where Amtrak operates over its own tracks. App. 143; *see also* App. 123, 143--144, 149.[9] Congress thus had good reason to make sure that subsection (b) of § 28103 was *not* limited to indemnification agreements between a rail passenger operator like Amtrak and freight railroads. Rather, it made perfect sense to cover all indemnification agreements between a rail passenger provider such as Amtrak and "any other party." App. 117; *see also* App. 148.

The Agreement allowed Petitioner to enter onto Amtrak's property and foul its high-speed railroad tracks in the Northeast Corridor. Amtrak gained nothing from agreeing to let Petitioner onto its property. Petitioner was not improving Amtrak's property, nor was it enhancing Amtrak's high-speed rail service. On the contrary, there was a risk that Petitioner's work would interfere with Amtrak's rail

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[9] *See, generally*, 49 U.S.C. §§ 24901-24909 (legislation regarding Northeast Corridor Improvement Program); 49 U.S.C. §§ 26101-26105 (legislation regarding High-Speed Rail Assistance).

passenger service operations. Amtrak nonetheless let Petitioner enter onto its property because it knew that its Agreement specifically protected Amtrak from any and all liability or losses due to injuries or death involving Petitioner's on-site workers, irregardless of Amtrak's negligence or fault. The broadly-worded language in § 28103(b) thus served precisely the purpose Congress intended. It assures the enforceability of Amtrak's indemnification arrangement with Petitioner, one which clearly relates to Amtrak's business of providing high-speed rail passenger service in its Northeast Corridor.

Petitioner -- as well as *Amicus* Connecticut Construction Industries Association, a construction industry trade organization of which Petitioner is a member -- claims that the Second Circuit's conflict preemption determination intrudes improperly upon police powers that should be the domain of the states. That is not so.

In the first place, § 28103(b) does not broadly infringe upon the authority of Connecticut or any other state to void indemnity arrangements in construction contracts. It does so *only* with respect to those agreements entered into with a provider of rail passenger transportation services. Moreover, Congress' authority under Commerce Clause to preempt the states' authority on the subject of interstate rail passenger transportation is beyond question. Indeed, it was this Congressional interest that led to the creation of Amtrak in 1971 (*see* Rail Passenger Service Act of 1970, Pub. L. 91-518); and Congress has since made explicit legislative findings

that underscore the strong federal interest in Amtrak's ability to provide "modern, cost-efficient and energy-efficient intercity rail passenger transportation between crowded urban areas and in other areas of the United States;" because of the importance of "[m]odern and efficient commuter rail passenger transportation . . . to the viability and well-being of major urban areas and to the energy conservation and self-sufficiency goals of the United States" 49 U.S.C. §24101(a)(1) and (5). Section 28103(b) represents just one more integral piece of legislation enacted by Congress intended to advance the nurturing of efficient, cost-effective rail passenger transportation service across the country.

In addition, although *Amicus* suggests that § 28103(b) creates safety risks by allowing a rail passenger transportation provider to be indemnified for its own negligence, the relevant legislative history essentially repudiates this contention. The House Committee Report -- in addressing the provisions limiting the provider's liability for passenger claims -- pointedly rejects the contention that its legislation would adversely impact rail safety. App. 126. The House Committee stresses that railroad safety is specifically subject to regulation by the Federal Railroad Administration and cites to numerous Congressional measures enacted to enhance rail safety. App. 126-127. The House Committee's Report concludes that "it is clear that adequate incentives remain in place to ensure the continued safe operation of the nation's rail system." App. 127.

Finally, there is no merit to Petitioner's complaint that the Second Circuit's Opinion fails to

explicitly reference a presumption against preemption. Petition at 34. This critique of the Opinion adds nothing to O&G's argument. The ultimate question is whether, after "examining the federal statute as a whole and identifying its purpose and intended effects," the "state statute presents a sufficient obstacle to the full accomplishment of Congress's objectives under the federal [a]ct to find it preempted." *Crosby*, 530 U.S. at 373 and 374, n. 8. The Second Circuit's Opinion clearly reaches the right result based on an appropriate conflict preemption analysis -- the Connecticut statute presents a substantial obstacle to 49 U.S.C. § 28103(b), requiring the invocation of preemption. *See Crosby*, 530 U.S. *at* 374, n. 8.

Petitioner's position is not advanced by this Court's most recent opinion in *Wyeth*, -- S.Ct. -- 2009 WL 529172. In *Wyeth*, this Court found that the petitioner drug company's conflict preemption argument was based on "an untenable interpretation of congressional intent and an overbroad view of an agency's power to [preempt] state law. *Id,* 2009 WL 529172, at *10. The legislative history, this Court concluded, indicated that Congress did *not* regard state tort litigation as an obstacle to achieving its purposes. *Id.* This Court also stressed that the drug company's preemption argument had to rely upon FDA comments in a preamble to a 2006 FDA regulation that did not merit any deference from the Court. *Id.*, at *11.

Unlike in *Wyeth*, the evidence of Congress' clear and manifest intent to preempt state law in this case is strong. The broad statutory language of § 28103(b),

the overall statutory scheme of the Amtrak Reform Act, and the underlying legislative history in this case all point to the same result. Congress' purpose and objective was to authorize Amtrak and other rail passenger providers to enter into indemnification agreements that would be fully enforceable, notwithstanding any contrary state law or public policy. As a result, the Connecticut statute upon which Petitioner relies presents a substantial "obstacle to the full accomplishment of Congressional objectives." *See Crosby*, 530 U.S. at 374, n. 8.

In summary, Petitioner's contention that 49 U.S.C. § 28103(b) does not preempt the Connecticut statute ignores the broadly-worded text of this federal statute and is antithetical to Congress' clear purposes and objectives. Petitioner's argument, if adopted, would cripple Amtrak's efforts to fully protect itself through indemnification agreements whenever contractors require permission to enter Amtrak's mainline track in order to work on projects, such as the rebuilding of Interstate 95. It would expose Amtrak's indemnification agreements to the vagaries of the laws of every state within Amtrak's Northeast Corridor. Furthermore, as this dispute demonstrates, it would lead to additional costly litigation with Amtrak's contractual indemnitors and the prospect of substantially inflated outlays to third-party claimants. Such an outcome is plainly at odds with Congress' purpose and intent when it enacted § 28103(b) as part of the Amtrak Reform Act. Accordingly, the Second Circuit's Opinion properly relied upon principles of conflict preemption in concluding that the broad

language of 49 U.S.C. § 28103(b) preempts Conn. Gen. Stat. § 52-572k.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

MARK S. LANDMAN
Counsel of Record
WILLIAM G. BALLAINE
MICHAEL A. JOSEPH
LANDMAN CORSI BALLAINE
& FORD P.C
120 BROADWAY
27TH FLOOR
NEW YORK, NY 10271-0079
TELEPHONE (212) 238-4800
Attorneys for Respondent National
Railroad Passenger Corporation

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In The

Supreme Court of the United States

O&G INDUSTRIES, INC.,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF

JEFFREY A. BLUEWEISS
BAI, POLLOCK, BLUEWEISS & MULCAHEY
One Corporate Drive
Shelton, CT 06484
(203) 925-8100

MICHAEL S. TAYLOR
Counsel of Record
KIMBERLY A. KNOX
WESLEY W. HORTON
BRENDON P. LEVESQUE
HORTON, SHIELDS & KNOX, P.C.
90 Gillett Street
Hartford, CT 06105
(860) 522-8338

Counsel for Petitioner O&G Industries, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF PARTIES

Petitioner's list of parties was set forth at page ii of its Petition for Writ of Certiorari, and there are no amendments to that statement.

CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page iii of its Petition for Writ of Certiorari, and there are no amendments to that statement.

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REPLY

What is clear in this case, and what the Respondent does not dispute, is that the Second Circuit's pre-emption ruling will have a far reaching effect on the laws of all of the States in which Amtrak operates. Within the context of this case, the Second Circuit has given Amtrak the broad and sweeping power to nullify Connecticut's traditional control over the safety of Connecticut construction sites, even though Congress specifically rejected an express grant of such authority (see, infra, p. 6). Beyond this case, the decision establishes a unique and dangerous precedent: that a generic grant of congressional authority, without more, can demonstrate the clear and manifest congressional intent necessary to supplant state law.

The Second Circuit's decision removes all meaningful incentive for Amtrak to promote safe practices at construction sites located on Amtrak property, because Amtrak may pass along the consequences of its negligent conduct without fear of state regulation or limitation. Indeed, even the States themselves will now be required to hold Amtrak harmless for any injury or damage it may cause, or face the possibility that Amtrak will refuse to grant access to Amtrak property to perform necessary repairs and improvements to the countless highway bridges, power lines, sewer lines and other infrastructure components that intersect Amtrak's railroad tracks. As a result, Amtrak now can essentially hold the safety of these major elements of our national infrastructure hostage

to its desire to protect itself from the consequences of its own bad acts.

Petitioner respectfully submits that Congress did not intend to give Amtrak so much power over the States and that the Second Circuit's ruling is in acute conflict with the pre-emption jurisprudence of this Court. Given the importance of the federal pre-emption question, and the far reaching scope of the Second Circuit's decision, a grant of certiorari is warranted in this case in order to preserve and protect the indispensable sovereignty of the States.

I. Congress did not intend to elevate Amtrak's financial concerns over the safety of Amtrak's operations

According to the Respondent, when Congress passed the 1997 Reform Act, it was so overwhelmingly concerned with Amtrak's financial straits that it intended to invalidate any state laws – including laws designed to promote public safety – that could limit Amtrak's ability to contract away the consequences of its own negligence. Congress did this, says the Respondent, in order to protect Amtrak from "significantly higher outlays in settlements and judgments." Respondent's Brief in Opposition ("RBO") 16, 17-18. But several factors demonstrate that the Respondent is wrong.

First, the Reform Act specifically limited Amtrak's exposure for passenger claims to $200 million per claim, but placed no such limitation on non-passenger

claims like the ones underlying this case. If Congress truly was concerned about the financial effect of non-passenger claims on Amtrak's bottom line, Congress would have placed a similar limitation on Amtrak's exposure to them.

The $200 million cap for passenger claims is important for another reason. Contrary to the Respondent's position, the legislative history of the Reform Act shows quite clearly that both Congress and Amtrak were exclusively concerned with Amtrak's exposure to large passenger claims, and that they expressed no concern over the type of non-passenger claims at issue here. In spite of its serious financial concerns, Congress specifically left Amtrak exposed to damages from passenger claims in the amount of $200 million per accident. It is difficult to reconcile that substantial exposure to passenger claims – the claims Congress was most concerned about – with Respondent's argument that Congress intended to protect Amtrak from *any* exposure to the claims in this case – claims Congress expressed no concern about at all. Congress simply did not express any intent that would warrant such a drastic conclusion.

Amtrak's substantial exposure to damages from passenger claims also reflects Congress' understanding of the effect of tort litigation on the promotion of safety. In its recent decision in *Wyeth v. Levine*, 555 U.S. ___, 2009 WL 529172 (2009), a case concerning the pre-emption of state tort actions alleging insufficient drug labeling, this Court recognized that state

tort actions "further consumer protection by motivating manufacturers to produce safe and effective drugs . . . " *Id.*, at *10. Also, state "tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risk promptly." *Id.*, at *12.

Similarly, state-law tort claims against Amtrak promote the safe operation of trains and safe practices on premises owned by Amtrak adjacent to its tracks. If Amtrak can avoid all liability for damages caused solely by its own negligence, then Amtrak will have no incentive to engage in safe practices in order to avoid those damages. Although Respondent makes a reference to federal fines that may be imposed on Amtrak for violations of federal safety regulations (RBO 22) (an observation that also applies to drug companies), there is no suggestion in the record that any such fines are applicable in this case or that any such fines were actually levied against Amtrak. Even if fines were levied, relatively small fines cannot possibly have the same deterrent effect as a tort action with potential exposure of $200 million. Under the Second Circuit's construction of 49 U.S.C. § 28103(b), that substantial deterrent, along with the safety practices it encourages, is eliminated.

II. Congress specifically elected *not* to include an express pre-emption provision in 49 U.S.C. § 28103(b)

Although Congress has enacted several provisions that expressly pre-empt state laws with respect to Amtrak, it specifically chose not to include express pre-emptive language in 49 U.S.C. § 28103(b). Express statements of pre-emption may be found, for example, in 49 U.S.C. § 24301(g), exempting Amtrak from state laws related to rates, routes, or service, 49 U.S.C. § 24301(h), pre-empting certain state laws concerning pay periods, 49 U.S.C. § 24301(i), pre-empting certain state laws concerning employee work requirements, 49 U.S.C. § 24301(j), which pre-empts laws concerning the joint use of facilities, and 49 U.S.C. § 28103(a) (contained within the same statute as the provision at issue in this case), which pre-empts state punitive damage laws in certain cases.

Respondent argues that Congress' whole purpose in passing 49 U.S.C. § 28103(b) was to prevent state laws from interfering with Amtrak's ability to seek indemnification. Specifically, Respondent claims that Congress intended to permit Amtrak to "enter into contracts allocating responsibility for claims *without regard to any laws that might otherwise impair or nullify such arrangement*" (emphasis added) RBO 10; and that Congress' clear purpose and intent was that Amtrak's indemnification agreements would be "enforceable *notwithstanding any law or public policy*" (emphasis added) RBO 16. It is difficult to reconcile such a purpose with the fact that, in spite of all of the

explicit statements of pre-emption that Congress included in the Amtrak Act, Congress did not include any express pre-emption statement in 49 U.S.C. § 28103(b).

Even more compelling is the fact that Congress *considered* including an express pre-emption statement in 49 U.S.C. § 28103(b) but chose not to do so. In its original form, subsection (b) contained pre-emptive language very similar to that found in subsection (a), providing as follows:

> Indemnification Obligations. Obligations of any party, however arising, including obligations arising under leases or contracts or pursuant to orders of an administrative agency, to indemnify against damages or liability for personal injury, death, or damage to property described in subsection a) incurred after the date of the enactment of the Amtrak Reform and Privatization Act of 1997, shall be enforceable, *notwithstanding any other statutory or common law or public policy*, or the nature of the conduct giving rise to the damages or liability.

S. 738, 105th Cong. § 161 (1997) (emphasis added). Of course, as passed, 49 U.S.C. § 28103(b) simply states that "a provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims."

What is clear, therefore, is that the language in Respondent's brief is Respondent's language, not the

language ultimately adopted by Congress. It is language Congress used elsewhere in statutes dealing with Amtrak, demonstrating that Congress has the ability to pre-empt when it intends to pre-empt, but it is language Congress specifically chose not to use in 49 U.S.C. § 28103(b). Although the absence of an express statement of pre-emption is not dispositive of the implied pre-emption question, see, e.g., *Geier v. American Honda Motor Co.*, 529 U.S. 861, 867-74 (2000), the fact that Congress specifically considered and rejected an express statement of pre-emption here is strong evidence that Congress did not intend 49 U.S.C. § 28103(b) to have the pre-emptive power the Second Circuit has given it.

III. The legislative history of 49 U.S.C. § 28103(b) does not support pre-emption

A possible explanation for the fact that Respondent expresses one congressional intent while 49 U.S.C. § 28103(b) expresses another is that Respondent cites to legislative statements about the *prior*, and very *different*, version of the statute. In its brief, Respondent relies heavily on House Committee Report No. 105-251 for the statement that:

> The bill . . . affirms that indemnity contracts between a passenger rail operator and any other party are fully enforceable without regard to any other law or public policy.

RBO 14, 19, citing App. 117. Respondent also relies on Senate Committee Report No. 105-85 to argue that

Congress was not only concerned with agreements between Amtrak and freight railroads, but agreements with "other parties" as well. RBO 15-16, 18, citing App. 148, 155-56.

What is critically important, however, is that both H.R. Rep. 105-251 and S. Rep. 105-85 refer to the *earlier version* of the Reform Act. As set forth above, that earlier version of H.R. 2247 and S. 738 contained dramatically different indemnification language which ultimately was not approved by Congress. It provided, in relevant part, as follows:

> Indemnification Obligations. – Obligations of *any party*, however arising, . . . to indemnify against damages or liability for personal injury, death, or damage to property . . . shall be enforceable, *notwithstanding any other statutory or common law or public policy*, or the nature of the conduct giving rise to the damages or liability.

(Emphasis added). Obviously, the legislative statements relied on by Respondent are direct references to the nearly identical language of the Act as it existed at the time. That precise language, however, *was omitted by Congress* before it passed the final version of the Reform Act. The only intent expressed by that chain of events is the intent of Congress *not to* imbue the statute with the pre-emptive force that Respondent and the Second Circuit believe it has.

To the extent that the legislative history of 49 U.S.C. § 28103(b) contains any specific discussion

about indemnification (which was not Congress' primary concern in passing the Reform Act), it describes only the concerns of Amtrak and the freight railroads on which Amtrak operates. Taken in context, the following legislative statements demonstrate Congress' real concerns:

> The bill also resolves an issue of long-standing concern to Amtrak and to the freight railroads over which Amtrak operates and removes a major barrier to the expansion of passenger rail service – exposure to tort liability from passenger train accidents. This exposure results from the usually involuntary participation of the freight railroad as a provider of facilities and infrastructure.

App. 117.

* * *

> Reforms to Amtrak's liability arrangements with freight railroads are tied directly to Amtrak's financial situation. The current liability arrangement leaves the freight railroads, over whose tracks Amtrak operates by law, potentially exposed to the full cost of a passenger rail accident.

App. 123.

* * *

> [A]fter the 1987 Chase, Maryland, accident involving the collision of an Amtrak train and a Conrail freight locomotive, the [district

> court] ruled that enforcement of the indemnification agreement between Amtrak and Conrail would violate public policy. . . . This avoided a large taxpayer-funded expense in the short term, but in the long run convinced the entire freight industry that the indemnity agreements offered no real legal protection.

App. 124.

* * *

> Amtrak and the freight railroads believe legislation is necessary to confirm enforceability of the indemnification agreements they have entered into regarding operation over each others' rail lines. . . . As long as there is the possibility that state laws governing indemnification contracts may make *these contracts* unenforceable, Amtrak and a freight railroad may find themselves litigating with each other.

(Emphasis added). App. 148.

In other words, the freight railroads, required by federal law to allow Amtrak to use their tracks, were concerned that they would also be required to bear the costs of Amtrak's negligence. They were worried that their indemnification agreements might be invalidated, leaving them exposed to large passenger claims caused by Amtrak's negligence even though they were not voluntarily allowing Amtrak to use their tracks. This was the *only* specific concern about

indemnification that Amtrak expressed or that Congress considered during the adoption of the Reform Act.

The Second Circuit failed to recognize this specific intent when it found a conflict between Connecticut law and 49 U.S.C. § 28103(b). By way of contrast, this Court's decision in *Geier* is an example of the level of Congressional intent necessary to invoke implied pre-emption. In *Geier*, the Court found that a state tort action premised on the requirement that certain vehicles be equipped with airbags was pre-empted by a Department of Transportation safety standard that specifically contemplated a range of safety options for motor vehicle manufacturers.

Closely analyzing the Department's historic treatment of the issue, this Court concluded that the "deliberate mix" of safety alternatives was based upon a series of careful and specific considerations regarding the best means to achieve safer motor vehicle standards that would be accepted by the public. See *Geier*, 529 U.S. at 878-882. The Second Circuit did not conduct a similarly careful analysis of the legislative history here, and Congress made no such careful legislative consideration with respect to Amtrak's right to indemnification.

IV. Presumption against pre-emption

Finally, Respondent argues that the Second Circuit's failure even to consider the presumption against pre-emption is irrelevant because the court

found that the state and federal laws at issue in this case were in conflict. RBO 23. In its most recent decision on implied pre-emption, however, this Court once again emphasized the importance of the presumption against pre-emption:

> [i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'

Wyeth, 555 U.S. ___, 2009 WL 529172, at *5, quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (additional citation omitted).

Wyeth went on to observe that this Court has long held that the presumption against pre-emption applies to claims of implied conflict pre-emption as well as claims of express pre-emption. *Wyeth*, 2009 WL 529172 at *5, n.3, citing *California v. ARC America Corp.*, 490 U.S. 93, 101-102 (1989); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716 (1985); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002). In the same footnote, the Court responded to Wyeth's argument that a long history of federal regulation made the presumption against pre-emption inapplicable. The Court explained that the presumption does not rely on the absence of federal regulation, and that Wyeth's argument, "misunderstands the principle: We rely on the

presumption because respect for the States as 'independent sovereigns in our federal system' leads us to the conclusion that 'Congress does not cavalierly pre-empt state-law causes of action.'" *Wyeth*, 2009 WL 529172, at *5, n.3, quoting *Lohr*, 518 U.S. at 485.

Here, the Second Circuit has ignored the presumption, summarily finding pre-emption without any clear and manifest expression of intent by Congress (and in the face of Congress' decision not to pre-empt state laws expressly). Because the Second Circuit's overbroad decision conflicts with the pre-emption jurisprudence of this Court and has the potential to support findings of pre-emption where Congress did not so intend, a grant of certiorari is warranted in this case.

CONCLUSION

Because this case presents a substantial question of state sovereignty, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

JEFFREY A. BLUEWEISS
BAI, POLLOCK, BLUEWEISS & MULCAHEY
One Corporate Drive
Shelton, CT 06484
(203) 925-8100

MICHAEL S. TAYLOR
Counsel of Record
KIMBERLY A. KNOX
WESLEY W. HORTON
BRENDON P. LEVESQUE
HORTON, SHIELDS & KNOX, P.C.
90 Gillett Street
Hartford, CT 06105
(860) 522-8338

Counsel for Petitioner

180 (2)

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In The
Supreme Court of the United States

O&G INDUSTRIES, INC.,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* CONNECTICUT CONSTRUCTION INDUSTRIES ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM S. WILSON II
Counsel of Record
RALPH W. JOHNSON III
KATHLEEN A. ST. ONGE
AMY E. MARKHAM
HALLORAN & SAGE LLP
One Goodwin Square
Hartford, CT 06103
(860) 522-6103

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

By stating that a provider of rail passenger transportation *may* enter into indemnification contracts, 49 U.S.C. § 28103(b), did Congress express a clear and manifest intent to preempt state laws of general applicability that prevent parties to construction contracts from obtaining indemnification for their own negligence?

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INTEREST OF AMICUS CURIAE

The Connecticut Construction Industries Association ("CCIA") is the premier commercial construction industry trade association in the state of Connecticut.[1] Formed almost 40 years ago, CCIA is an association of associations, where all sectors of the commercial construction industry work together to advance and promote Connecticut's construction industry. CCIA strives to "Build a Better Connecticut" and a better quality of life for all citizens of the state. CCIA has 376 members statewide including contractors, subcontractors, suppliers and providers of construction services from all areas of the commercial construction industry. CCIA provides services in the areas of industry relations, labor relations, legislation, education, safety training, safety consulting and loss control, contract documents, public relations and group insurance programs.

CCIA is comprised of nine divisions, ranging from Associated General Contractors of Connecticut, whose members construct commercial buildings owned privately or by the state, to the Connecticut Road

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[1] Counsel of record received timely notice pursuant to Rule 37.2 of CCIA's intention to file this brief. Each party has consented to the filing of this brief and each party's letter of consent has been lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, no party authored this brief in whole or in part and no person or entity other than CCIA or its members, or its counsel contributed money to the preparation or submission of the brief.

Builders Association, whose members build our state's transportation systems, to the Utility Contractors Association of Connecticut, which represents the utility contractors who specialize in water, drainage, sewer and water treatment facility construction work. CCIA also has registered professional lobbyists who represent the organization on all state legislation that affects the construction industry.

CCIA closely monitors legal issues that affect the entire construction industry and often offers its perspective in cases raising such issues. The issue in this case is especially significant. This case involves the preemption of the long-standing public policy and law in Connecticut that precludes indemnification in construction related contracts against liability for damages caused by one's own negligence. Accountability for one's own actions at a construction site is not only the public policy in Connecticut, it is the policy in forty-five other states that prohibit in one way or another indemnification for one's own negligence in construction contracts. This case affects all contracts related to construction work performed over, under or near the respondent's vast array of rail lines throughout Connecticut and other parts of the country.

STATEMENT

This case arises out of a tragic accident that occurred during the night of June 16, 2004 in East

Haven, Connecticut. Two Connecticut residents and employees of the petitioner, O&G Industries, Inc., a Connecticut corporation, Gregory Roberts and Peter Quintiliani, were performing repairs on a section of Interstate-95 that passed over railroad tracks owned by the respondent, the National Railroad Passenger Corporation ("Amtrak"), pursuant to an agreement with the State of Connecticut. O&G was required to obtain a temporary permit from Amtrak to enter Amtrak's property to perform the repairs. The permit was a non-negotiable standard form that gave Amtrak exclusive control over all aspects of safety at the site, but contained a provision requiring O&G to indemnify Amtrak, even for Amtrak's sole negligence. All train traffic on those tracks was supposed to have been stopped. However, unbeknownst to the workers and the on-site Amtrak safety personnel, an unscheduled "test train" was making its way down the track towards the worksite while Roberts and Quintiliani were suspended under a bridge and over the railroad tracks in a manlift. By the time the test train engineer saw the construction site it was too late for him to stop the train. The train slammed into the manlift on which the employees were working, killing Roberts and injuring Quintiliani.

Quintiliani and Roberts' estate sued Amtrak in the United States District Court for the District of Connecticut. Amtrak admitted liability and a jury ultimately awarded the claimants in excess of $1 million each. Amtrak then sought indemnification for the sums paid to the claimants from O&G pursuant

to the indemnification provision contained in the permit.

In this case, the United States Court of Appeals for the Second Circuit upheld the district court's granting of summary judgment in favor of Amtrak on the grounds that 49 U.S.C. § 28103(b) preempts application of Conn. Gen. Stat. § 52-572k because application of the Connecticut statute would violate the plain language and spirit of § 28103(b). (Petitioner's App. 1-33) That is, the district court determined that the provision of § 28103(b) that permits Amtrak to enter into agreements allocating financial responsibility for claims preempts the Connecticut statute that prohibits, as a matter of public policy, provisions in certain construction contracts that purport to indemnify a party against its own negligence. (Petitioner's App. 34-47) Because forty-six states have enacted anti-indemnity statutes in some form or another, the Second Circuit's decision in this case is of national significance.

SUMMARY OF ARGUMENT

By the decision below, the Second Circuit has expanded the sweep of preemption to a situation where it simply did not apply. In doing so, it overlooked significant public policies and Connecticut statutes. In particular, the policies embodied by the various anti-indemnity statutes will be diluted if those statutes are deemed inapplicable to Amtrak,

because allowing a shifting of financial responsibility in the manner presented in this case creates precisely the "moral hazard" that the courts were intended to avoid. Allowing the decision to stand not only circumvents courts' intentions from being encouraged carelessness on the part of Amtrak, which may endanger residents of Connecticut and the city at large. It also unfairly burdens any entity required to obtain a temporary permit for work near Amtrak's rail lines because of discrepancies in their bargaining position. Entities doing business with Amtrak will be forced to accept financial responsibility for Amtrak's negligence even where the underlying injuries are caused by Amtrak's negligence. Moreover, allowing the decision to stand may shift financial responsibility for a loss to a party who did not do cover by insurance and may not be able to pay because they unwittingly assumed responsibilities they believed were against the law. This would not only allow Amtrak to avoid responsibility for its negligence, but may also leave an injured party without any recourse for recovery.

In addition to undermining the policies embodied by anti-indemnity statutes, the decision below undermines Connecticut's comparative negligence and workers' compensation schemes. In particular, Connecticut's workers' compensation statute, like its comparative negligence statute, reflects the principle that the negligent party is the party that should bear the cost of damages to the fullest extent possible.

Under the circumstances presented in this case, these safeguards schemes are turned on their heads: an employer with no liability whatsoever (O&G) is not only obligated to compensate its injured employees in accordance with the law but, moreover, it is obligated to indemnify the fortfessor (Amtrak) for the damages the fortfessor paid to the injured employees. This result is contrary to the principles of holding fortfessors liable for their negligence and only to the extent of their negligence.

Finally, the Second Circuit's position in this case has serious practical consequences for citizens and in particular, members of the construction industry, throughout the country. Accordingly, the petition should be granted.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE ISSUES PRESENTED IN THIS CASE ARE OF NATIONAL SIGNIFICANCE AND AFFECT VARIOUS PRINCIPLES OF STATE LAW IN VIRTUALLY ALL FIFTY STATES

This case presents a legal question of great significance to the construction industry and to the public generally. Every day, throughout the country, there are thousands of construction projects underway in various stages of completion. These projects involve multiple contractual arrangements setting

forth the duties and obligations of the various entities involved in the project – landowners, design professionals, general contractors, subcontractors, and bonding agencies. Customarily, these contracts typically contain provisions allocating responsibility among the parties for liabilities that may arise in the course of the project. Forty-six states have seen fit to prohibit parties to construction contracts from absolving themselves of financial responsibility for their own negligence, to one extent or another, through the enactment of so-called "anti-indemnity statutes" – Connecticut is one of these states.[3] Yet, by its decision

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[3] Alaska Stat. § 45.45.900 (2008); Ariz. Rev. Stat. § 34-556 (2008); Ark. Code Ann. § 4-56-101 (2008); Cal. Civ. Code § 5715 (2008); Colo. Rev. Stat. § 13-20.5-101 (2008); Conn. Gen. Stat. § 52-572K (2008); Del. Code Ann. tit. 6, § 2704 (2008); Fla. Stat. § 725.06 (2008); Ga. Code Ann. § 13-8-2 (2008); Haw. Rev. Stat. § 431:10-222 (2008); Idaho Code Ann. § 29-114 (2008); 740 Ill. Comp. Stat. Ann. 35/1 (2008); Ind. Code Ann. § 26-2-5-1 (2008); Kan. Stat. Ann. § 16-121 (2008); Ky. Rev. Stat. Ann. § 371.180 (2008); La. Rev. Stat. Ann. § 9:2780 (2008); Md. Code Ann., Cts. & Jud. Proc. § 5-401 (2008); Mass. Gen. Laws ch. 149, § 29C (2008); Mich. Comp. Laws Serv. § 691.991 (2008); Minn. Stat. § 337.05 (2008); Miss. Code Ann. § 31-5-41 (2008); Mo. Rev. Stat. § 434.100 (2008); Mont. Code Ann. § 1 8-2-121 (2007); Nep. Rev. Stat. § 52-51.187 (2008); Nev. Rev. Stat. Ann. § 616B.030 (2008); N.H. Rev. Stat. Ann. § 338-A:1 (2008); N.J. Rev. Stat. § 2A:40A-1 (2008); N.M. Stat. Ann. § 56-7-1 (2008); N.Y. Gen. Oblig. Law § 5-322.1 (2008); N.C. Gen. Stat. § 22B-1 (2008); N.D. Cent. Code § 9-08-02.1 (2008); Ohio Rev. Code Ann. § 2302.31 (2008); Okla. Stat. tit. 15, § 221 (2008); Or. Rev. Stat. § 30.140 (2007); 68 Pa. Cons. Stat. § 491 (2008); R.I. Gen. Laws § 6-34-1 (2008); S.C. Code Ann. § 32-2-10 (2007); S.D. Codified Laws § 56-3-18 (2008); Tenn. Code Ann. § 62-6-123 (2008); Tex. Civ. Prac. & Rem. Code Ann. § 130.002 (2008); Utah Code Ann. § 13-8-1 (2008); Va. Code Ann.

(Continued on following page)

below, the Second Circuit has relegated the significant public policies rendering these statutes to the sidelines in favor of finding an implied intent by Congress to preempt these policies and, more importantly, to essentially exempt Amtrak from these public policies.

The anti-indemnity statutes are in line with both state and federal common law where contract provisions that violate public policy are deemed invalid. It is contrary "violates some explicit public policy [a contract] is applied to refrain from enforcing it." W.R. Grace & Co. v. Local Int'l Union of United Rubber Workers, 461 U.S. 757, 766 (1983). "Such a public policy, however, must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." Id. (citation and quotation marks omitted). Contracts "which are detrimental to the interests of the public as understood at the time" are invalid as against public policy. Pope Mfg. Co. v. Gormully, 144 U.S. 224, 233 (1892). See also Blake D. Morant, Contracts Limiting Liability: A Paradox with Tacit Solutions, 63 TUL. L. REV. 717, 734-737 (1989) (hereinafter "Morant,"). This is especially pertinent to indemnity agreements that affect a public interest or duties that involve the public.

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§ 11-4.1 (2008); West. Rev. Code Ann. § 4.24.115 (2008); W.Va. Code R. § 22-8-14 (2008); Wis. Stat. § 895.447 (2008); Wyo. Stat. Ann. § 30-1-131 (2008).

Amtrak is a common carrier whose duties affect the public across the country. Common carriers "in the course of conducting their public function generally cannot insulate themselves from the consequences of their negligence." Morant, supra, at 147-48. See Railroad Co. v. Lockwood, 84 U.S. 357, 386 (1873). See also Biggo v. Inland Waterways Corp., 349 U.S. 85, 88-89 (1955) (tug boat operators). Congress has declared that the policy of the United States government in regulating the railroad industry, among other things, is to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. This clearly stated purpose preceded and was not affected by 49 U.S.C. § 28103. The Second Circuit's interpretation of § 28103 allowing Amtrak to be indemnified for its own negligence does not promote safety near railroads in Connecticut or anywhere in the United States.

The reasons why the Second Circuit was wrong to find Conn. Gen. Stat. § 52-572k preempted by § 28103(b) have been thoroughly and ably explained in the Petition for a Writ of Certiorari filed by ORC and will not be augmented herein. CCIA believes, however, that additional explication of the state law principles and public policies at issue, as well as the effects of the underlying decision on the construction industry generally, is warranted.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION ADVERSELY AFFECTS THE CONSTRUCTION INDUSTRY BY VITIATING THE APPLICABILITY OF CERTAIN STATE LAW PRINCIPLES TO CERTAIN CONSTRUCTION CONTRACTS

A. Historical Background And Principles Behind Anti-Indemnification Statutes

States began enacting anti-indemnification statutes in the 1960s in response to the inclusion of indemnification provisions in standard construction contracts promulgated by the American Institute of Architects and the National Society of Professional Engineers. 4 STEVEN G.M. STEIN, CONSTRUCTION LAW, ¶ 13.21[3] (2008) (hereinafter "STEIN"). Generally, those provisions required contractors to indemnify architects or engineers against damage caused in whole or in part by the negligence of the contractor or his agent. Id. Concerns arose out of fears that smaller contractors would be unable to procure insurance to protect against the liability posed by those indemnification agreements or that the cost of insurance would be prohibitive. Id. Many contractor associations petitioned their state legislators to pass some form of the anti-indemnification statutes that exist today. Id. A broad range of indemnity statutes exist across the country. The form, scope, and application of these statutes vary greatly, ranging from statutes that void statutes rendering against acts known to be negligent at the time the act is done, to statutes

voiding agreements that indemnify against the sole negligence or negligence of the party receiving indemnification. See generally, Allen Hold Gwyn & Perl E. Davis, Fifty States Survey of Anti-Indemnity Statutes and Related Caselaw, 53 CONSTR. LAWYER 58 (Summer 2003).

The fact that the vast majority of states have adopted an anti-indemnity statute in some form or another, demonstrates a nearly *unanimous* public policy that, in some circumstances, parties to construction contracts should not be permitted to obtain indemnification for their own negligence. Courts have upheld these statutes, recognizing that they are instrumental in the maintenance of safe workplaces for employees. See, e.g., McMunn v. Hertz Equip. Rental Corp., 167 F.3d 88, 92 (1st Cir. 1998) (purpose of Indiana anti-indemnity statute is to increase safety on construction sites) (citing Fort Wayne Corrugating v. Indiana & Michigan Electric Co., 443 N.E.2d 883 (Ind. App. 1983)); Caldwell v. Gulf Oil Co., 670 F.Supp. 636, 676 (N.M.1983) (interpreting New Mexico anti-indemnity statute as prohibiting indemnitee from contracting away liability for its own percentage of negligence and finding that statute promotes workplace safety and freedom of contract). See also STEIN, supra, at ¶ 13.17[3][b]. Stated differently, the idea is that "[a] party that knows it will not be financially responsible has little incentive to take any preventive measures to ensure its negligence does not hurt a third party." Trisha Stroge, From the Bottom of the Food Chain Looking Up: Subcontractors and the Evil

Cost of Additional Insured Endorsements, 52 CONSTR. LAWYER 51 (Summer 2008). Additionally, "these arrangements are believed to compel overreaching in the construction industry where small contractors and suppliers are often powerless to fully negotiate an allocation of risk through indemnity agreements." Stein, supra, at ¶13.11[5][b]. See also Jamres v. Burlington Northern Santa Fe Ry. Co., No. CV02-4108-PCT-NVW, 2005 U.S. Dist. LEXIS 63581 at *51 (D. Ariz. Aug. 25, 2005) (citing 3 Philip L. Bruner and Patrick J. O'Connor, Bruner and O'Connor on Construction Law, § 10:9 (2005) (attributes "acquire more equitable distribution of costs and risk of injury in the construction industry where disparities in bargaining power are common, and misfortune is rarely the fault of one party alone")).

Furthermore, "[w]hen challenged, anti-indemnification statutes have been upheld as valid and not violative of any constitutional right of due process," equal protection or the impairment of contracts." Stein, supra at ¶13.11[5][b] (footnote omitted). Courts have upheld these statutes on two grounds. "First, these statutes are construed as evidencing an intent to insure that persons in the construction industry maintain an incentive to provide a safe workplace for employees." Id. "The courts reason that allowing a contractor, owner, or architect to be free from liability for his own negligence reduces the incentive to safely operate the workplace." Id. "Second, these statutes are believed to compel overreaching in the construction industry where small

contractors and suppliers are often powerless to truly negotiate an allocation or risk through indemnity agreements." Id. "Thus, the courts conclude that the firm public policy goals of encouraging safety and eliminating "unconscionable" contract provisions outweigh the normal right of private individuals to contract as they see fit." Id.

B. The Policies Embodied By The Various Anti-Indemnity Statutes Will Be Undermined If Those Statutes Are Deemed Inapplicable To Amtrak

The underlying principles polstered by the various anti-indemnity statutes are generally the same – one such-indemnity agreement working to allevigation of the promises to engage personal pergaining power between the parties to construction contracts. The effect of the Second Circuit's decision is to exempt Amtrak from the ambit of these statutes and their attendant public policies, while nonetheless otherwise applecting Amtrak to apply cable state contract law. (Ref. at 08-18) Allowing the decision to stand results in significant dilution and undermining of the two (and virtually numerous) policy goals of increasing workplace safety and alleviating the burdens of disparate pergaining power between parties to construction contracts.

In particular, the underlying decision, it allowed to stand, will undermine the public policies of those states in which Amtrak owns property and that have

adopted anti-indemnity statutes. Connecticut and all states enjoy state police powers to protect "the safety, health, morals and general welfare of the public" within their respective borders. Lochner v. New York, 198 U.S. 45, 53 (1905). This power includes preventing individuals from making certain contracts which the state deems are against public policy. Connecticut exercised its police power by enacting Conn. Gen. Stat. § 53-257K to preclude parties from indemnifying against liability for another's negligence in construction related agreements.

It is also a bedrock principle of tort law that "every person has a duty to use reasonable care not to cause injury to those who may be reasonably could foresee to be injured by his negligent conduct," whether that conduct consists of acts of commission or omission." Gazo v. City of Stamford, 765 A.2d 505, 508 (Conn. 2001). The duty to use care "may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act." Id. (citation and quotation marks omitted). Further, with respect to premises, the duty of a property owner to maintain premises in a reasonably safe condition is nondelegable. Smith v. Town of Greenwich, 888 A.2d 263, 272 (Conn. 2005). Negligence is defined by making parties pay for their negligent acts or omissions.

The core purpose behind anti-indemnity legislation is to make all parties at a construction site

responsible for the consequences of their own negligence. This minimizes the "moral hazard" where a party who is indemnified may use less care to avoid injury or loss because the indemnified party is not liable for its own actions. See Samir B. Mehta, Additional Insured Status in Construction Contracts and Moral Hazard, 3 CONN. INS. L. J. 183, 187-188 (1996/1997). This carelessness could result in more accidents on the worksite that could have been avoided. By prohibiting indemnification for another's negligence, the public is better protected from the dangers and consequences of unsafe or poor quality construction. When held accountable, parties are incentivized to exercise a higher degree of care. Indemnity removes this incentive.

If the extent indemnity agreements which indemnify against another's negligence are not outlawed, they generally are not favored by reviewing courts. Such provisions are strictly construed to ensure that they express the intent to indemnify in clear and unequivocal language. "A contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties." United States v. Seckinger, 396 U.S. 203, 211 (1970). "This principle, though verbally articulated, is accepted with virtual unanimity among American jurisdictions." Id. Contract, in particular, does not favor contract provision that purport to relieve a person from his own negligence. Hanke v. Tompet Kirby Restaurant Corp.,

888 A.2d 747, 745 (Conn. 2005). This is so "because exculpatory provisions undermine the policy considerations governing our tort system." Id. As articulated by the Connecticut Supreme Court, those policy considerations include "compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct. . . . An equally compelling function of the tort system is the prophylactic factor of preventing future harm. . . . The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer." Id. (citation and quotation marks omitted). These principles are further reflected in the legislative history of Conn. Gen. Stat. § 52-572k. During the floor debate, Representative Frankel noted that it is contrary to fair principles of law to give a party a license to act negligently. (Petitioner's App. 182)

There, it is only in the most clear of circumstances that exculpatory contract provisions will be recognized. Here, where an exculpatory provision is protected by statute, the public policy arguments against such provisions are even stronger. The Second and Circuit's decision overlooks these significant points.

C. The Policies Underlying Connecticut's Anti-Indemnity Statute Are Also Reflected in Connecticut's Comparative Negligence Law

The policies embodied by anti-indemnity statutes are also enforced with the concept of comparative negligence adopted in Connecticut: i.e., that parties should be held financially responsible for their own negligence, but not that of another. Conn. Gen. Stat. §§52-572h. The Connecticut legislature passed the Tort Reform Act embodied in §§52-572h in the mid 1980s "in response to rapidly rising insurance rates, which, some believed would be curtailed if tort liability could be limited and systemized. . . . As finally enacted the act represents a complex web of interdependent concessions and pairings struck by hostile interest groups of opposing philosophical positions." Sansone v. Board of Police Comm'r, 228 A.2d 516, 517 (Conn. 1967).

Section 52-572h(c) provides in relevant part as follows: "In a negligence action to recover damages resulting from personal injury, wrongful death or damage to property occurring on or after October 1, 1987, if the damages are determined to be proximately caused by the negligence of more than one party, each party against whom recovery is allowed shall be liable to the claimant only for such party's proportionate share of the recoverable economic damages and the recoverable noneconomic damages . . . ."

Conn. Gen. Stat. § 52-572h(c) (emphasis added).[5] The statute includes a provision that it does not impair any right to indemnity "under existing law." Id. Accordingly, the comparative negligence statute only deters to indemnity agreements permitted by law. Indemnity agreements prohibited by Conn. Gen. Stat. § 52-572k are not permitted by law and therefore are not saved by this suspension.

Thus, the principles *underlying* comparative negligence (holding parties liable only for their own negligence) overlap with the principles *underlying* Connecticut's anti-indemnity statute (promotion of workplace safety by holding parties liable for their own negligence, among others). Therefore, these bodies reflect the principle that, in the absence of clear and "unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts." Hanks, 288 A.2d at 637 (citation omitted).

Here, the situation is even more stark – § 52-572k mandatorily voids certain exculpatory provisions in certain construction contracts. Stated another way, the Connecticut legislature, like almost all of its sister legislatures, has determined that certain exculpatory provisions in certain construction contracts should simply be void, eliminating the need for

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[5] The statute also permits reallocation of damages when damages are uncollectible from a liable defendant. Conn. Gen. Stat. § 52-572h(g).

court analysis of the intent manifested by the parties to the contract, or consideration of public policy concerns.

D. Permitting Amtrak To Receive Indemnification Would Undermine Connecticut's Workers' Compensation Scheme

Allowing Amtrak to obtain indemnification in these circumstances (that is, where Amtrak would be indemnified for its own negligence) also runs contrary to Connecticut's workers' compensation scheme, in that Connecticut employers are normally permitted to seek reimbursement from third parties who cause injuries to employees in the course of their employment. *See* Conn. Gen. Stat. § 31-293(b). Here, the exact opposite will occur: the party responsible for the employee's injury will receive indemnification from the employer, a result completely contrary to that contemplated by Connecticut's statutory workers' compensation scheme.

Conn. Gen. Stat. § 31-293(a) provides that the employer of an injured employee "having paid, or having become obligated to pay, compensation under the provisions under this chapter may bring an action against such person to recover any amount that he has paid or has become obligated to pay as compensation to the injured employee." The statute further provides that if the employer and the employee are joined as plaintiffs in an employee's lawsuit against a tortfeasor, "and any damages are recovered, the

damages shall be so apportioned that the claim of the employer, as defined in the section, shall take precedence over that of the injured employee and the proceeds of the recovery, after the deduction of reasonable and necessary expenditures, including attorney's fees, incurred by the employee in effecting the recovery." *Id.* In other words, the employer of an employee injured as a result of a third party's actions has a priority claim to any damages recovered from the third party, after deduction of reasonable and necessary expenditures, in order to make the employer whole.

This statute, like Connecticut's comparative negligence statute, reflects the principle that the negligent party is the party that should bear the cost of damages to the fullest extent possible. That is, while employers are obligated to pay workers' compensation benefits, they are also given the opportunity to be made whole when an employee's injuries are caused by a third party. Under the Second Circuit's decision, however, this statutory scheme is turned on its head: an employer with no liability whatsoever (O&G) is not only obligated to compensate its injured employees in accordance with the law but, moreover, is obligated to indemnify the tortfeasor (Amtrak) for the damages the tortfeasor paid to the injured employees. The Second Circuit failed to recognize that this result is contrary to the principles of holding tortfeasors liable for their negligence and only to the extent of their negligence.

CONCLUSION

At bottom, the Second Circuit expanded the sweep of preemption to a situation where it simply did not apply. In doing so, it overlooked significant public policies and Connecticut statutes. Moreover, the Second Circuit's position has serious practical consequences for citizens, and in particular, members of the construction industry, throughout the country. Accordingly, the petition should be granted.

Respectfully submitted,

WILLIAM S. WILSON II
Counsel of Record
RALPH W. JOHNSON III
KATHLEEN A. ST. ONGE
AMY E. MARKHAM
HALLORAN & SAGE LLP
One Goodwin Square
Hartford, CT 06103
(860) 522-6103

Counsel for Amicus Curiae

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